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Supreme Court of the United States

OCTOBER TERM, 1964

CAROLINA & NORTHWESTERN RAILWAY COMPANY, ATLANTIC & EAST CAROLINA RAILWAY COMPANY, STATE UNIVERSITY RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

W. GRAHAM CLAYTOR, JR.
HENRY J. KARISON
Southern Railway System
P. O. Box 1808
Washington, D. C. 20013

HUGH B. COX
WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Appellants

Of Counsel:

COVINGTON & BURLING

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the United States District Court for the Western District of North Carolina, which dismissed appellants' complaint praying that an order of the Interstate Commerce Commission be enjoined, annulled and set aside.

OPINIONS BELOW

The opinion of the District Court (R. 43-46) is reported at 234 F. Supp. 112 and is set forth in Appendix A hereto (pp. 1a-4a, *infra*). The report and

order of the Interstate Commerce Commission are reported at 319 I.C.C. 639 and are set forth in Appendix C hereto together with relevant excerpts from the recommended decision of the Commission's hearing examiner (pp. 7a-50a, *infra*). (Both the Commission's report and order and the examiner's recommended decision are in the transcript of record in the material covered by the Commission Secretary's certification at R. 52.)

JURISDICTION

This action was commenced by a complaint filed in the United States District Court for the Western District of North Carolina under 28 U.S.C. § 1336, Section 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, praying that an order of the Interstate Commerce Commission setting new divisions of joint rates on certain coal traffic on the lines of the appellants and the Louisville & Nashville Railroad Company be annulled, enjoined and set aside on grounds, among others, to be urged on this appeal. A three-judge court, as required by 28 U.S.C. § 2325, was convened pursuant to 28 U.S.C. § 2284. After receiving briefs and hearing argument the District Court filed its per curiam opinion on September 28, 1964, and entered its judgment dismissing appellants' complaint on October 14, 1964 (R. 47; Appendix B hereto, pp. 5a-6a, *infra*). Appellants filed notice of appeal to this Court on November 16, 1964. This Court's jurisdiction to hear this appeal is conferred by 28 U.S.C. § 1253. The following cases sustain this Court's jurisdiction: *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962); *American Trucking Ass'ns* v. *United States*, 364 U.S. 1 (1960).

STATUTES INVOLVED

The complaint against appellants before the Interstate Commerce Commission was brought by the Louisville & Nashville Railroad under Sections 1(4) and 15(6) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4), 15(6). Section 1(4) provides in pertinent part:

> "It shall be the duty of every common carrier subject to this part . . . in the case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 15(6) provides:

> "(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and de-

termining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

QUESTIONS PRESENTED

In finding existing divisions of certain joint coal rates unlawful and prescribing new divisions for the future, the Interstate Commerce Commission relied solely upon the relative costs of the carrier parties to the joint rates. The originating carrier, the Louisville & Nashville Railroad (L. & N.), supplies all the cars used in the coal movement involved. Assigning this fact as the reason, the Commission departed in major respects from the formula it ordinarily uses in rate and division cases in its computations of the carriers' costs. It based those computations on evidence submitted by the L. & N. The questions presented are these:

1. Whether the Commission, in using reproduction value in computing the depreciation and return elements of the L. & N.'s freight car costs, in attributing all such costs to the passage of time and none to the use of the cars and in failing to credit against such costs the rental payments received by the L. & N. from appellants, exceeded its statutory authority by

attempting to equalize carrier costs rather than finding actual carrier costs as a basis for judging and prescribing divisions.

2. Whether in the computation of the L. & N.'s freight car costs the Commission made adequate findings supported by substantial evidence on the record as a whole to sustain its use of reproduction value, its failure to allocate costs between time and mileage, its failure to credit rental payments received against the L. & N.'s costs and the adoption of a system-wide average figure as the measure of the time cars spent on the L. & N.'s line.

3. Whether in its resolution of the issues mentioned in Question 2 above the Commission acted arbitrarily in reaching conclusions at odds with its findings and with logic, reason and its previously-expressed expert judgment on railroad accounting and cost finding.

4. Whether the Commission gave any valid reason for its failure to correct errors and imperfections pointed out by appellants in the cost figures it adopted.

STATEMENT

At issue in the proceeding before the Interstate Commerce Commission was the division of rates for the movement of coal from mines on the lines of the L. & N. to destinations on the lines of the appellants (hereinafter sometimes referred to as the Southern).[1] The

[1] The appellants Atlantic & East Carolina Railway Company, Carolina & Northwestern Railway Company and State University Railroad Company are all subsidiaries of the appellant Southern Railway Company and with others these companies comprise the Southern Railway System. Each of the appellants was a party both to the proceeding before the Interstate Commerce Commission and to the proceeding in the United States District Court for the Western District of North Carolina, and each is affected by the order of the ICC that is the subject of this judicial proceeding.

proceeding before the Commission was begun by a complaint filed in 1959 by the L. & N. under Sections 1(4) and 15(6) of the Interstate Commerce Act alleging that the rates were unfairly divided, contrary to the dictates of those provisions, between the carriers participating in the movement.

As is not unusual in the case of coal traffic, the L. & N., as the originating carrier, supplies all the cars used in the movement. The cars that it supplies are predominantly old 50-ton hopper cars, long since obsolete and rapidly being replaced by forward-looking railroads. The L. & N. picks up coal in these cars at mines located on its lines in a small area of southeastern Kentucky and eastern Tennessee and delivers the loaded cars to the Southern at a common point on their tracks, Knoxville. The Southern takes the cars to their destinations, points on its lines in North Carolina and South Carolina and Augusta, Georgia, and returns them empty to the L. & N. at Knoxville. Southern pays the L. & N. a substantial rental for every day an L. & N. car is on the Southern's lines. Under a nationwide agreement the railroads pay one another for the time the freight cars of one are on the lines of another. See *Boston & Me. R.R.* v. *United States*, 162 F. Supp. 289 (D. Mass. 1958), *appeal dismissed without prejudice*, 358 U.S. 68 (1958); *Chicago, R. I. & P. Ry.* v. *United States*, 284 U.S. 80 (1931). During the period relevant in this case the per diem, as the car rental payments are called, was a flat $2.75 a day regardless of type, condition or age of the car involved. This amount was established on the basis of the average expenses associated with the ownership and maintenance of all railroad freight cars in the United States. If the car on another carrier's line is an old car no longer sub-

ject to depreciation or even a car that because of its size or age incurs a smaller annual depreciation charge on an original cost basis than the average car, there is a significant element of profit for the owning railroad in per diem payments. This is especially so because the per diem is calculated on the basis of replacement value rather than original cost.

Since the route from the L. & N. mines in Kentucky and Tennessee to the Carolinas by way of Knoxville was opened in 1918, divisions have been computed on a basis that is traditional for coal traffic. It is called the base group-differential method. The mines at which the coal originates are grouped geographically. One group is chosen as the base group, and rates from it to the various destinations are published. The rates from other groups are differentially related to the rates from the base group, depending on relative distances from the interchange point. That is, the rate from a differentially-related group to any destination is a flat amount greater or less than the rate from the base group to the same destination. In dividing the revenues from the movement, the originating carrier receives a fixed amount or a fixed percentage of the joint rate on all movements from the base group. In the case of movements from differentially-related groups the originating carrier receives the same amount or percentage plus or minus the flat differential. (Pp. 8a-9a, *infra*).[2]

This method of dividing revenues was adopted by agreement of the parties, not by prescription of the

[2] All references herein are to the opinion of the court, the Commission's report and order or the examiner's recommended decision, all of which (relevant excerpts from the recommended decision only) are printed as appendices hereto; citations are to the appendices only.

Commission, and remained in effect for forty years. Nevertheless, in 1959 the L. & N., alleging that the method did not produce equitable divisions for it, formally complained to the Commission.

In its complaint the L. & N. asked the Commission to prescribe a formula for computing divisions that would have given it nearly $1,000,000 more and the Southern nearly $1,000,000 less of the 1958 revenues from the Carolinas coal movement of not quite $5,000,000. (Pp. 11a, 28a, *infra*). The Commission's hearing examiner recommended to the Commission almost what the L. & N. had asked for. (P. 32a, *infra*). On exceptions the Commission, however, acting through its Division 2 consisting of three Commissioners, departed from the recommendation of the examiner but did find existing divisions unlawful and prescribed new divisions that had the effect of transferring $540,000 in annual revenues from the Southern to the L. & N. (P. 34a, *infra*).

In its report the Commission basically proceeded in three steps:

First, it concluded that in all respects other than relative costs the two carriers were "substantially equal" and that therefore it need not take into account factors other than costs that Section 15(6) of the Interstate Commerce Act requires it to consider in establishing divisions. (Pp. 29a-31a, *infra*).

Second, it concluded, on the basis of what it found to be the relative costs of the two carriers, that the existing base group-differential method of dividing revenues did not result in just, reasonable and equitable divisions, as the statute requires. (P. 32a, *infra*).

Third, again on the basis of its cost findings, it prescribed a new formula for calculating divisions. (Pp. 33a-34a, 37a-40a, *infra*).

The formula is expressed as a mileage scale, on which is reflected the cost, as computed by the Commission, of each railroad's carrying a given amount of coal a given distance. (P. 40a, *infra*). Finding the proper division of revenues for any combination of hauls is a matter simply of applying to the joint rate percentages derived from the scale figures for each carrier for its haul.

In the Commission's findings as to relative costs, which were basic to its conclusion, it accepted in their entirety the cost figures submitted by the L. & N. The Commission made no secret of this fact. It spoke of the L. & N.'s cost evidence as "reasonably and sufficiently reliable and acceptable for the purposes of this case" and again of "the costs, as restated by the complainant [the L. & N.] and accepted here by us . . . ." (Pp. 24a, 30a, *infra*). Although the Commission decided the case solely on the basis of costs, the analysis of costs in its report is not extensive. It adopted "the substance of the examiner's findings concerning costs in all material respects." (P. 24a, *infra*). The examiner dealt with the matter at some length but not with the thought that his cost findings would control the decision; he recommended a division formula that was not based on costs.

After denial of a petition for reconsideration appellants filed their complaint in the District Court, asking it to enjoin and set aside the Commission's order based on these findings. They urged that inadequacies in the cost data submitted by the L. & N. and errors in the assumptions underlying them had

led the Commission to make demonstrably erroneous, inadequate and unsupported subsidiary findings in support of its ultimate findings as to costs. They alleged that there was no rational basis for certain steps in the Commission's decisional process. They also asserted that the Commission had attempted to equalize the comparable costs of the respective carriers rather than find the actual costs and that this violated the Commission's mandate under Section 15 (6) of the Interstate Commerce Act.

In a brief per curiam opinion the three-judge court, after observing that the ICC had recited its consideration of the factors made pertinent to its consideration by the governing statute, concluded without analysis that the complaint presented no question of law and should be dismissed. (Pp. 1a-4a, *infra*).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Congress has made orders of the Interstate Commerce Commission subject to judical review. 28 U.S.C. § 1336. Congress has made no exception for Commission orders in the formulation of which cost evidence plays a significant part. Nevertheless, the order of the Commission at issue here has not been subjected to meaningful judicial review quite apparently because the order was based upon costs. The District Court dismissed the substantial claims of the appellants with remarks that "the appraisal of cost figures is itself a task for experts,"[3] that the task did not seem to have been inexpertly done in the case at hand and that the court could not substitute its appraisal of the facts for that of the Commission. The opinion ended with a bare unsupported statement of a conclusion that the Com-

[3] Quoting New York v. United States, 331 U.S. 284, 328 (1947).

mission had not acted capriciously or arbitrarily or misinterpreted or misapplied the law. (Pp. 3a-4a, *infra*).

The fact is that there is no question in this case of substituting a court's judgment for that of the Commission on disputed questions of fact. There is no question of deference to Commission expertise in the assessment of facts. There are, rather, substantial questions of law, including the proper construction of an important section of the Interstate Commerce Act, the adequacy of Commission findings and the validity of the reasoning that led to its decision. These are matters for judicial determination. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167-68 (1962); *Baltimore & O. R.R.* v. *United States,* 298 U.S. 349, 358 (1936); *Mississippi Valley Barge Line Co.* v. *United States,* 292 U.S. 282, 286-87 (1934). Nothing in *New York* v. *United States,* 331 U.S. 284, 328-35 (1947), indicates that a different rule applies where carrier costs are involved—that the presence of cost evidence and cost determinations effectively immunizes a Commission order against being tested by the courts against legal standards ordinarily applicable.

I. The Commission Overstated the Freight Car Costs of the L. & N.

As briefly as the subject matter permits, a description of the major errors committed by the Commission follows:

Certain costs are associated with the ownership of freight cars. These include depreciation, repair and maintenance expenses and a specified return on the investment in the cars, frequently called a cost in rate

making. Because the L. &. N supplied all the coal cars, the only such costs in the case before the Commission were those of the L. & N. It alone had the direct cost burdens of ownership. As computed by the Commission, the L. & N.'s car costs for the movement in issue amounted to $178,043, 22 per cent of its total costs in a test period. (P. 37a, *infra*). The car cost figure was grossly inflated, as we shall show, and thereby served improperly to increase the size of the L. & N.'s divisions as prescribed by the Commission, since the divisions were prescribed by the Commission solely on the basis of relative costs.

The Southern, though not having any direct coal car ownership costs, had a corresponding expense item. This was the aggregate of the per diem rental payments it made to the L. & N. for L. & N. cars operated on the Southern's lines. These payments were at the flat rate of $2.75 a day during the period that the Commission used as a test period for finding costs. Like any rental payments, the per diem payments were designed to compensate the L. & N. for the cost of its ownership of cars during the time they were in the hands of another carrier. More significantly, the per diem payments represented actual out-of-pocket dollar costs to Southern. As it happens, the per diem in the relevant period was a flat amount for all cars regardless of type, age, condition or the extent of their use by the lessee. The amount of the per diem payment was established by agreement of the carriers on the basis of the average expenses associated with the ownership and maintenance of all railroad freight cars in the United States. The depreciation and return elements of the per diem included an increment to make them reflect reproduction value rather than the original cost of the cars. But the basis on which the per diem pay-

ments were computed was a matter of no consequence in figuring the Southern's costs associated with the Carolinas coal movement. The end product $2.75 a day was all that mattered. The Southern had to pay that amount every day an L. & N. car was on its lines, and the total of these payments for cars used in the coal movement in a given period made up its car costs. Thus the calculation of this part of the Southern's costs was simply a matter of multiplying the number of carloads of coal in the test period times the average number of days each car spent on Southern's lines times $2.75. There has never been any significant dispute about the figure, $158,041 as compared with the L. & N.'s car costs of $178,043, that results from this calculation. (P. 37a, *infra*).

The calculation of the L. & N.'s car costs is slightly more complicated but presented a thoroughly routine problem for any ICC cost expert. A proper way to proceed would be to take the L. & N.'s total annual freight car depreciation and freight car maintenance and repair expense, the expenses classified as freight car costs, and allocate them as between costs attributable to the passage of time alone and costs attributable to wear and tear caused by use.[4] In addition, an allowance for a return on investment in the cars would be computed as a fixed percentage of their original cost less accumulated depreciation, and this would be allocated entirely to time. Then the sum of the time portion of expenses plus the entire return would be divided by the number of car days experienced in the

[4] Under a costing formula called Rail Form A, developed by the Commission staff and used in virtually all rate and division proceedings including this one, 70% of repair and maintenance costs are allocated to use as measured by mileage and 30% to time; 55% of depreciation is allocated to time and 45% to mileage.

year to obtain the appropriate unit cost related to time, which is cents per car day. Similarly, the mileage portion of the annual expenses would be divided by the number of car miles during the year to obtain the appropriate unit cost related to use, which is cents per car mile. Then these systemwide unit cost figures would be used to find the car costs associated with the coal movement in issue by multiplying the unit costs by the service units—car days and car miles—experienced in the movement in a test period. Since the L. & N.'s ownership costs continued whether the cars were on its line or the Southern's line, the multipliers properly would be the entire number of car days and car miles and not merely the car days and car miles on the L. & N.'s line. Since, however, the L. & N. was reimbursed by the Southern for its ownership costs incurred while the cars were on the Southern's line, the amount of the reimbursement, which is the total of Southern's per diem payments, would be deducted from the L. & N.'s car costs.

The L. & N. and so the Commission, which accepted the L. & N.'s cost figures in gross, went through most of these steps, but in three major respects they departed from the formula. The Commission thereby inflated the L. & N.'s car costs and so increased its share of the divisions prescribed at the expense of the Southern. The three major ways in which the L. & N.'s car costs were distorted are these:

1. The Commission attributed all of the L. & N.'s car costs to the passage of time and none to use, thus indulging the fanciful assumption that a freight car sitting idle will develop as many defects that must be repaired and will depreciate as quickly as a freight car in constant use. (Pp. 48a-50a, *infra*).

2. Instead of using the figure for depreciation that appears on the L. & N.'s books and in its reports to the Interstate Commerce Commission and its tax returns, a figure based on the original cost of its cars, the Commission increased this figure by applying to it a factor intended to bring the value of the cars for depreciation purposes to the current cost of reproducing them. In the same way it computed the L. & N.'s return on the reproduction value of the cars, although in Commission ratemaking carriers' returns are figured on original cost. (Pp. 25a, 48a-50a, *infra*).

3. While recognizing, indeed emphasizing, that the only car ownership costs were those of the L. & N. (Pp. 14a, 30a, *infra*)—which necessarily continue when the cars are off the L. & N.'s line—the Commission computed the L. & N.'s car costs only for the days that cars spent on the L. & N.'s lines. (P. 43a, *infra*). It thus in effect irrationally credited against the L. & N's car costs only the part of the Southern's per diem payments that equaled the L. & N.'s off-line car costs, although the per diem amount greatly exceeded the L. & N.'s daily car costs, even as such costs were inflated by the Commission. (See pp. 49a-50a, *infra*).

Without these distortions the L. & N.'s net car costs, instead of $178,043 as the Commission calculated, would be $46,307. That figure, if given effect in the Commission's divisional scale, would reduce from $540,000 to $226,149 the annual shift of revenues from the Southern to the L. & N. resulting from the Commission's order.

II. IN SEEKING TO EQUALIZE CARRIER COSTS RATHER THAN FIND THEM THE COMMISSION EXCEEDED ITS STATUTORY AUTHORITY, AND IT MADE NO FINDINGS AND STATED NO REASONS THAT SUPPORT ITS ACTION.

The Commission increased the L. & N.'s car costs in the ways we have described because, as it explained specifically of its use of reproduction value rather than original cost, it wished to make the costs of the two carriers "comparable." (P. 25a, *infra*; see also p. 50a, *infra*). By this the Commission apparently meant that, because the Southern made per diem payments computed on the basis of reproduction value and time alone, the L. & N. should be treated as if its car costs were incurred on that same basis. Further, the Commission's examiner, whose findings it adopted, thought that to deduct from the L. & N.'s car costs the per diem payments it received from the Southern would for some reason result in understatement of the L. & N.'s costs. (Pp. 47a-48a, *infra*). There is no logic whatever in the Commission's position. The Southern paid car rental at the rate of $2.75 a day. That was a direct cost to it, associated with the coal movement the revenues from which were being divided. It is immaterial for purposes of this case on what basis those rental payments were computed. They could have been related to the value of the commodity moved, for example, and still they would have been a dollars and cents expense to the Southern that was actually incurred in connection with the movement at issue. The "comparable" costs of the L. & N. were the costs of owning and maintaining its coal cars that it actually incurred. The L. & N.'s depreciation expense and its return on investment appear on its books as computed on the basis of the original cost of the cars,

not on the discredited basis of the cars' reproduction value. Experience, moreover, has shown that some part of maintenance, repair and depreciation expense is incurred because of the mere passage of time and another part depends on wear and tear from use of the cars. Finally, the L. & N.'s costs of owning and maintaining the coal cars used in the movement at issue were effectively reduced by the rental compensation it received from the Southern in the form of per diem payments. A computation of costs recognizing these three simple points would have yielded L. & N. car costs "comparable" to the total of the Southern's per diem payments in the only sense in which the word "comparable" can properly be used under the statute—that is, for each carrier the costs it actually incurred would be recorded for comparison each with the other.

It is appellants' position, therefore, that in forsaking this kind of comparability in favor of some other goal the Commission was doing something that Section 15(6) of the Interstate Commerce Act, which governs the prescription by the Commission of divisions of joint rates, does not permit. Section 15(6) directs the Commission to give due consideration to, among other things, "the amount of revenue required to pay . . . [the carriers'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation . . .." This is not a direction or an authorization to the Commission to attempt to equalize carriers' expenses if they are different from one another but is a simple and clearcut direction to give effect to expenses actually incurred. This the Commission quite plainly has failed to do. It has manipulated the car costs of the

L. & N. as if they were mere bookkeeping entries without relationship to anything in the real world. By doing so it has awarded to the L. & N. revenues far greater than what are needed to cover its actual expenses. By the same action it has deprived the Southern of revenues to which it is lawfully entitled.

If the Commission's order does not rest upon the misinterpretation of the statute we have just described, it is impossible to tell upon what it does rest because the Commission has not made adequate findings to support its action or stated in reasoned terms the considerations that led to its conclusion.

First, the Commission itself made *no* finding and gave *no* reasons for its failure to make a separation between time and mileage in computing the L. & N.'s car costs. The Commission's hearing examiner, whose findings with respect to costs the Commission adopted, said merely that to make the separation would "cause severe penalties" to the L. & N. "when compared with the Southern's car costs computed on a per diem basis," and that such costs of the L. & N. would be "unduly depressed in comparison with the Southern's car costs on a per diem basis." (P. 48a, *infra*). These statements, without further explanation, mean no more than that, if computed so as to reflect what experience has taught are the factors that determine their incurrence, the L. & N.'s car costs are relatively lower than the Southern's actual corresponding costs. This is no reason at all for ignoring the L. & N.'s actual costs in favor of artificially constructed costs related to time alone.

Moreover, the Commission's action in disregarding mileage or use as a determinant of car costs is contrary to the single judicial decision on the point, *Boston &*

Me. R.R. v. *United States*, 162 F. Supp. 289 (D. Mass. 1958), *appeal dismissed without prejudice*, 358 U.S. 68 (1958). That was an action to set aside a Commission order approving the then current per diem rate that had been agreed to by the railroads. It had been proposed to the Commission that instead of a straight per diem rate it adopt a system of car-hire payments that would be related both to time and to mileage. The Commission had given, in the district court's words, only "cursory consideration" to the proposal. The court was so impressed by the logic of the time and mileage separation that it set aside the Commission's order for its error "in brushing aside a matter of such importance to so many vital links in our transportation system with little more than a casual wave of the hand." 162 F. Supp. at 297-98. Here too there has been no more than a wave of the examiner's hand perfunctorily ratified by the Commission.

Second, as we have already indicated, the Commission's only finding or stated reason supporting its use of reproduction value in computing the L. & N.'s car costs was that "the use of reproduction cost for L. & N.'s cars, which is readily ascertainable here, makes comparable these costs as between the complainant and the defendant placing them on an equal footing." (P. 25a, *infra*). This is a completely inadequate reason. The principle of comparability does not require that persons differently situated be treated as if they were identical. It does not require that if one of two carriers whose costs were being compared had lower unit fuel costs than the other the two carriers must be treated as if their fuel costs were the same. No more does it require that the L. & N. be treated as if its car costs were computed in the same way as the corresponding costs of the Southern. The Southern

paid the L. & N. $2.75 for every day an L. & N. car was on the Southern's line. The elements that make up the $2.75 charge are quite immaterial. The expense is one that must be borne by the Southern and so must enter into fixing its divisions of the joint coal rates since it is among the costs that the Southern must recoup from the revenues derived from those rates. As for the L. & N., it charges each year an amount for depreciation of the coal cars used in the Carolinas movement; that amount is based on the original cost of the cars, following the Commission's accounting regulations. Too, the L. & N. is entitled to recover from the coal revenues a return on its investment in its cars measured by their original cost. There is nothing in the concept of comparability that requires the Commission to pretend that the L. & N. charges depreciation on the reproduction value of its cars or that it should receive an inflated return based on reproduction value.

Thus the Commission stated no reason that justifies inflating the L. & N.'s car costs by the use of reproduction value. More than this, the propriety of using reproduction value, however the Commission might seek to justify it, is open to serious legal question. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 605, 606 (1944). In *Boston & Me. R.R.* v. *United States*, 162 F. Supp. 289, 296 (D. Mass. 1958), *appeal dismissed without prejudice*, 358 U.S. 68 (1958), the court, following the trend of modern decisions represented by the *Hope* case, seriously questioned the use of reproduction value in the per diem formula that was before it, and the matter is still before the Commission for final resolution.

Third, the failure to reduce the L. & N.'s car costs by the full amount of the per diem payments it received from the Southern cannot be said to have been ex-

plained at all by either the Commission or its examiner. The Commission in its report did not advert to the point although the logic of adjusting the L. & N.'s car costs to take account of the per diem payments is simplicity itself. Unless it is done the L. & N. has a windfall, enjoying at the expense of the Southern both rental payments and extra revenues because of its larger divisions.

The form of the L. & N.'s cost studies that were accepted by the Commission obscured the point, however, and this may explain the Commission's silence. The L. & N. calculated its car costs only for the time the cars spent on its line. This is traditional in cases where each of the carriers dividing revenues from a joint rate supplies a share of the cars so that per diem payments wash out, and each carrier may fairly be charged with the costs of its own cars on its own line. Here, however, where the only direct car costs were those of the L. & N. and these costs were incurred both when the cars were on the L. & N.'s line and when they were on the Southern's line, the only conceivable rationale for limiting the L. & N.'s costs to the time spent on its line is that the L. & N. is recompensed by the Southern for the time the cars spend on the Southern's line. Thus the per diem payments in substance were charged against the L. & N.'s costs but only to the extent that they matched the L. & N.'s off-line costs. In fact, and this is what creates the gross inequity in the Commission's method, the per diem payments did more than match the L. & N.'s costs. The per diem payments were at the rate of $2.75; even on the Commission's inflated statement, however, the L. & N.'s car costs were only $1.78 a day. There is no possible justification for not charging against the

L. & N. as an effective offset of its costs the remaining 97 cents a day.

In confused passages of his recommended decision the examiner seemed to recognize the existence of the spread between per diem payments and off-line L. & N. car costs. (Pp. 49a-50a, *infra*). He did not undertake to explain why the difference should not be given effect in the computation of the L. & N.'s costs except to say that to do so would tend to understate those costs. (Pp. 47a-48a, *infra*). This is obviously not so if in fact there is the spread whose existence the examiner recognized and which cannot be questioned. The failure to take any of this into account is perhaps the Commission's most egregious error.

* * *

We have not attempted here fully to argue the merits of our position. Nor, for the sake of keeping this statement within reasonable bounds, have we urged upon the court certain other substantial questions that we will argue if jurisdiction is noted. Like the questions we have discussed, these have not been meaningfully reviewed as yet because of the failure of the District Court to come to grips with appellants' claims. These questions relate to the Commission's error in accepting, because of a demonstrable misunderstanding of the evidence of record and for an invalid reason. the L. & N.'s statement of the number of days each coal car on the average spent on the L. & N.'s line, an overstatement that resulted in increasing the L. & N.'s costs (pp. 15a-16a, *infra*; included in Questions 2 and 3); and the Commission's failure to give any sensible reason for rejecting corrections and refinements offered by the Southern to the L. & N.'s cost study that was accepted by the Commission (p. 47a, *infra*; Question 4).

CONCLUSION

Probable jurisdiction should be noted and the case set for argument on the merits.

Respectfully submitted,

W. GRAHAM CLAYTOR, JR.
HENRY J. KARISON
Southern Railway System
P. O. Box 1808
Washington, D. C. 20013

HUGH B. COX
WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Appellants

Of Counsel:

COVINGTON & BURLING

January 1965

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CIVIL No. 2219

CAROLINA & NORTWESTERN RAILWAY COMPANY, ATLANTIC & EAST CAROLINA RAILWAY COMPANY, STATE UNIVERSITY RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY,

Plaintiffs,

versus

THE UNITED STATES OF AMERICA,

Defendant,

INTERSTATE COMMERCE COMMISSION and LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Intervenor-Defendants.

(Heard September 14, 1964 Decided September 25, 1964)

Before three-judge court at Charlotte, North Carolina: Bell, Circuit Judge, and Warlick and Craven, District Judges

* * *

PER CURIAM:

This is a proceeding brought by Southern Railway[1] to restrain and set aside an order of the Interstate Commerce Commission and has been heard and considered by a district court of three judges, as provided by Section 2325 and Section 2284, Title 28, United States Code.

The order[2] sought to be enjoined and vacated found that the existing divisions (between Southern and Louisville

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[1] The other plaintiffs are subsidiaries of Southern.

[2] Docket No. 32784, Louisville & Nashville Railroad Co. v. Southern Railway Co., et al., 319 I.C.C. 639.

& Nashville Railroad Company) of joint rail rates on bituminous coal from mines on the lines of L. & N. to delivery points on the lines of Southern and its subsidiaries are, and for the future will be, unjust, unreasonable, and inequitable in violation of Sections 1(4) and 15(6) of the Interstate Commerce Act, 29 U.S.C.A. 1(4) and 15(6), and prescribed what the Commission considered a fairer division.

Section 15(6) of the Act specifies that whenever the Commission finds that the divisions of joint rates "are, or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers' parties thereto . . . (it) shall . . . prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers . . . ." In prescribing divisions, the Commission is obligated to give due consideration, "among other things", to the following factors:

(1) "(T)o the efficiency with which the carriers concerned are operated,"

(2) "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation,"

(3) "the importance to the public of the transportation services of such carriers,"

(4) "and also, whether any particular participating carrier is an originating, intermediate, or delivering line, and"

(5) "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

Cost of service is one of the elements to be considered by the Commission in its determination of fair and just

divisions. *Akron, Canton & Youngstown Ry. Co. v. U. S.*, 261 U.S. 184, 195, 67 L.Ed. 605 (1923).

The Commission did not ignore the criteria set out in the foregoing statute, but, instead, carefully considered all of the requisite factors. It determined that the carriers were equally efficient and their respective services of equal importance to the public. It noted that neither carrier was a weak line or in financial distress. It noted that L. & N. was the originating carrier and Southern (and its subsidiaries) the delivering line. After considering all of the statutory factors and others within the catch-all provision of Section 15(6),[3] except the relative costs, and concluding that they were of equal weight as among the parties with respect to the question at issue here, the Commission gave primary weight to the relative costs of the carriers.

"The weight to be given to any of the factors enumerated in the statute must necessarily depend upon the case under consideration, and the evaluation of the importance of the various factors is peculiarly within the purview of the Commission." *Boston & M. R. v. United States*, 208 F. Supp. 661 (D. Mass. 1962), aff'd 371 U.S. 261, 83 S.Ct. 117, 9 L.Ed. 2d 95 (1962).

Having determined comparative costs to be a factor of especial importance, the Commission then carefully considered all of the evidence relating to costs, determined the fully distributed costs of each carrier, and adjusted the division of rates accordingly. The ultimate facts found are supported by substantial evidence.

To be sure, cost accounting is not an exact science. "The appraisal of cost figures is itself a task for experts

[3] "(A)ny other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

. . . ." *New York v. U. S.*, 331 U.S. 284 at 328, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947). But we do not perceive it was inexpertly done, nor have we the power to substitute our fact appraisal for that of the Commission. Administrative Procedure Act, 5 U.S.C.A. Section 1009(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1950); *Carolina Scenic Coach Lines v. United States*, 56 F. Supp. 801, 804 (W.D.N.C. 1944), aff'd 323 U.S. 678, 65 S.Ct. 277, 89 L.Ed. 550 (1944); *U. S. v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536, 66 S.Ct. 687, 90 L.Ed. 821 (1946).

With much ingenuity, counsel for Southern has attempted to find questions of law where there are none. The Commission has acted neither capriciously nor arbitrarily, nor has it misinterpreted or misapplied the law.

Counsel may present an appropriate judgment in accordance with this opinion. This *25th* day of September, 1964.

/s/ J. SPENCER BELL
J. Spencer Bell, *Circuit Judge*
Fourth Circuit Court of Appeals

/s/ WILSON WARLICK
Wilson Warlick, *District Judge*
Western District of North Carolina

/s/ J. B. CRAVEN, JR.
J. Braxton Craven, Jr., *District Judge*
Western District of North Carolina

A True Copy

TESTE:

THOS. E. RHODES, *Clerk*

By: V. E. BARTLETT
Deputy Clerk

(Seal)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CIVIL No. 2219

CAROLINA & NORTWESTERN RAILWAY COMPANY, ATLANTIC & EAST CAROLINA RAILWAY COMPANY, STATE UNIVERSITY RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY,

Plaintiffs,

versus

THE UNITED STATES OF AMERICA,

Defendant,

INTERSTATE COMMERCE COMMISSION and LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Intervenor-Defendants.

Judgment

The above-entitled action to enjoin, set aside, annul and suspend the order of the Interstate Commerce Commission in Docket No. 32784, *Louisville & Nashville Railroad Co.* v. *Southern Railway Co., et al.*, 319 I.C.C. 639, came on for final hearing before the undersigned three-judge statutory

court, and in accordance with the opinion of the Court dated September 25, 1964, it is hereby

ORDERED, That the relief prayed for in the complaint be, and it is hereby, denied and the complaint be, and it is hereby, dismissed.

Dated at Charlotte, North Carolina, this 13th day of October, 1964.

/s/ J. SPENCER BELL
J. Spencer Bell, *Circuit Judge*
Fourth Circuit Court of Appeals

/s/ WILSON WARLICK
Wilson Warlick, *District Judge*
Western District of North Carolina

/s/ J. B. CRAVEN, JR.
J. Braxton Craven, Jr., *District Judge*
Western District of North Carolina

A True Copy

TESTE:

THOS. E. RHODES, *Clerk*

By: V. E. BARTLETT
Deputy Clerk

(Seal)

APPENDIX C

Served Sept. 25, 1963

30051

INTERSTATE COMMERCE COMMISSION

No. 32784

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. SOUTHERN RAILWAY COMPANY ET AL.

Decided September 11, 1963

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* * *

Report and Order of the Commission

DIVISION 2, COMMISSIONERS FREAS, WEBB, AND BUSH

FREAS, *Commissioner:*

Exceptions to the recommended report were filed by the complainant and the defendants, and replies thereto were filed. Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainant, the Louisville and Nashville Railroad Company, hereinafter called the L. & N. or the complainant, alleges by complaint filed on January 2, 1959, that the present divisions of joint rates [1] on bituminous coal from points on its lines in southeastern Kentucky and eastern Tennessee to Augusta, Ga., and other destinations on the lines of the Southern Railway Company and its subsidiaries, [2] herein-

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[1] Rates are stated per ton.

[2] Atlantic and East Carolina Railway Company, Carolina and Northwestern Railway Company, and State University Railroad Company.

after referred to singly as the Southern or the defendant, in North Carolina and South Carolina, were and are unlawful in violation of sections 1(4) and 15(6) of the Interstate Commerce Act. We are asked to prescribe lawful divisions for the future, and to require retroactive adjustment of the divisions to the date of the filing of the complaint.

The origin territory embraces six counties[3] in the extreme southeastern part of Kentucky and three counties[4] in the adjoining area of Tennessee. It is served by the complainant's Cumberland Valley Division and Knoxville and Atlanta Division from which, respectively, there were distributed coal cars totaling about 260,550 and 14,770 in 1957 and 217,770 and 10,790 in 1958. For ratemaking purposes, the 127 mines in the origin territory have been placed in 4 origin groups: Group 1 or the Windrock group, located in Tennessee 40 miles northwest of Knoxville, Tenn., consists of only one mine from which there is no movement. Group 2 or the La Follette group, which consists of four mines, is located north of group 1 in Tennessee an average distance of 60 miles from Knoxville. Group 3 or the Jellico-Middlesboro group includes 73 mines in Tennessee and Kentucky, lying north and east of group 2, an average distance of 127 miles from Knoxville. Group 4 or the Harlan group, composed of 49 mines, is located east of group 3 in Kentucky an average distance of 183 miles from Knoxville. The destination area includes a total of 658 points on the defendant's lines, but in 1957 the traffic terminated at only 193 of those stations, and in 1958 at 168 stations. As to the latter the actual distances on the Southern ranged from 122 to 426 miles.

The present divisions of the rates, subject to the minor changes hereinafter mentioned, were established in 1918

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[3] Bell, Clay, Harlan, Knox, Lee, and Whitley.

[4] Anderson, Campbell, and Claiborne.

during World War I, at the instigation of the Regional Director of the Railroad Administration, to open the Knoxville route and relieve traffic congestion at Atlanta. The distance over the L. & N. from the mines to Atlanta is substantially greater than to Knoxville. The L. & N. proposed a division of joint rates, accepted by the Southern without resort to arbitration, which took cognizance of the competitive conditions obtaining in the absence of wartime Federal control. Predicated upon the fact that the preponderance of the coal moved from group 3 mines, the L. & N. sought to establish the latter as the primary group, with the others differentially related thereto. Instead, under the ultimate agreement it was allowed 65 cents per ton from group 1, with the balance of the through rate assigned to the Southern, and with groups 2, 3, and 4 made differentially higher, such differentials accruing solely to the L. & N. Group 2 was made 5 cents over the base rates of group 1, group 3, 10 cents higher, and group 4, 20 cents. Although the rates to be divided have changed as a result of various adjustments, the present method for prorating divisions remains substantially the same as those originally established. For example, the present group 2 rates are 6.7 cents over those from the base group, group 3 rates are 11.12 cents higher, and group 4 rates, 18.19 cents.

In 1958, the L. & N. sought increases in its divisions, but the Southern refused to negotiate. Recent reductions by the complainant in rates to Krannert, Ga., and Thomas, Ala., continue to observe the base group method of making the divisions, and other railroads which originate coal for delivery in the Carolinas, including the Southern, also follow that method.

With few exceptions, the maximum reasonable level of the rates was originally prescribed in *North Carolina Corp. Comm.* v. *Aberdeen & R. R. Co.*, 200 I.C.C. 571 (1934). Therein, a mileage basis was provided to representative destinations, with the requirement that the rates at intermediate points should be properly related to those pre-

scribed. Continuation of the previously specified differentials between the mine groups was required. The basis applicable to the Carolina was reexamined in 1948 in *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I.C.C. 291 (hereinafter referred to also as No. 29390), and certain revisions were made in the mileage scale, but the existing relationships between the mine groups were maintained. The Commission also indicated that to the rates resulting under the findings in the latter case, the carriers may add the general increases authorized on bituminous coal in Ex Parte Nos. 162 and 166.

Since June 30, 1946, authorized increases in coal rates in revenue proceedings have totaled only about 78 percent, compared with an average of 112 percent in freight rates generally. Coupled with the lesser increases in coal rates, the L. & N. of necessity must share revenue from coal with connecting lines. The L. & N. delivers 80 percent of the coal originating on its lines to connecting carriers; The Chesapeake and Ohio Railway Company, by way of comparison, interchanges only about 48 percent of coal which it originates with connections.

Traffic studies.—Both the complainant and the defendant made traffic studies. The L. & N. study showed that in 1957 almost 24,000 cars of coal moved from the L. & N. mine origins over the Knoxville route to 193 destinations on the Southern in the Carolinas. Total revenue derived from coal moving from groups 3 and 4 to the 13 largest Carolina consuming points was in excess of $3 million, of which the L. & N. received $1,157,600 or about 38 percent and the Southern the remaining $1,902,400 or 62 percent. This revenue represents about 64 percent of the total derived from all of the involved coal traffic for 1957.

The defendant conducted a traffic study during January, April, July, and October 1958, when 7,906 cars moved to 168 destination points on the Southern. If the approximately 8,000 carloads in this study were projected to a 12-month

basis, the result would be comparable to the total carloads shown in the 1957 study made by the L. & N. Canton, N.C., received the greatest number of cars, over 1,700, during the defendant's study period. The revenue divisions in the 4-month period were 36 percent to the L. & N. and 64 percent to the Southern out of the total revenue of about $1.6 million.

Proposed divisions.—The complainant proposes a fixed allowance of 60 cents per net ton to the originating line, with the remainder of the rates to be prorated on the basis of the scale prescribed in No. 29390. That scale is based on the short tariff distances, commencing with a rate of $2 per ton for 120 to 140 miles and progressing 10 cents for each additional 20 miles. The initial deduction of 60 cents per ton is intended to cover the originating costs of supplying and distributing cars to the mines, gathering the loaded cars, and constructing branches and extensions of line as mines become depleted. The L. & N. estimates that the proposed divisions would produce an annual increase in its revenues of about $950,000.

Certain other bases of divisions are also offered for comparison, with the results computed from groups 3 and 4 to the 13 principal consuming points at which about 64 percent of the considered coal traffic moving through Knoxville was terminated in 1957. These alternate scales are based on either a straight mileage prorate or a prorate applied to 20-mile or 50-mile blocks. To this base is added from 150 to 250 miles for the originating carrier, and from 50 to 83 miles for the terminating carrier. They all produce roughly an additional $1 million in revenue for the L. & N. except that the mileage prorate and the Carolina Coal Scale, without any allowances or other modifications, would produce approximately half that amount.

The Southern contends that it experiences a deficit on the present base-group method of divisions while the L. & N. enjoys a net profit, and that the Southern should

have a greater divisional share of the rates, rather than a smaller proportion as the complainant seeks. The relative earnings and costs will be discussed more fully hereinafter.

History of the movement.—As indicated, the route via Knoxville was not opened until June 1918. The number of carloads moved in 1917 from group 3 mines via Atlanta was then accepted by both parties hereto as the proper basis for the division of the joint rates via Knoxville. In 1917, almost 2,400 cars, representing approximately 74 percent of the total movement, originated in group 3, and practically all of the remainder from groups 2 and 4. By 1957, the pattern had changed somewhat, although group 3 with somewhat more than 13,000 cars was still the leader and group 4 with more than 10,000 cars was close behind; only about 300 cars moved from the other groups. Thus, almost 99 percent of the coal interchanged at Knoxville originates at the more distant mines in groups 3 and 4.

The divisions agreed upon in 1918 were based on the weighted average distance of 115 miles for the L. & N., and the actual distance for the Southern. The present weighted average distance from group 3 mines is 137 miles over the L. & N. and 203 miles for the Southern, and from all groups, 156.7 miles over the L. & N. From all groups, the corresponding distance over the Southern is 194.5 miles, based on shipments to 168 points during the 4-month study in 1958. While in 1917, 27 percent of the tonnage moved to North Carolina and 73 percent to more-distant destinations in South Carolina, the situation in 1957 had practically reversed, with 70 percent terminated in North Carolina and 30 percent in South Carolina. The changes in the movement of the coal indicate that at present the L. & N. is originating traffic at more-distant mining areas, and the Southern is generally serving less-distant destinations. The 1958 study showed that the Southern's simple average distance from Knoxville to the more important typical destinations was 277 miles, and that it was serving a greater number of destinations than in 1917.

The consumption of coal increased substantially between 1917 and 1957. In 1917, about 3,200 carloads moved to 84 destinations in South Carolina and 38 destinations in North Carolina, primarily for use as heating fuel. Of the total 1957 movement of about 24,000 cars, more than one-fifth moved to 1 consignee at a single destination, and over one-half was delivered to 9 destinations. As a result of industrial growth in the Carolinas, coal is consumed in large quantities for generating electric power by public utilities, and for manufacturing. For example, during the period 1920 to 1957, the use of coal for generating power in these States rose from slightly in excess of 200,000 tons to almost 5 million tons, an increase of nearly 2,000 percent.

Originating lines.—The L. & N. uses its facilities in eastern Kentucky and Tennessee almost exclusively in the transportation of coal. Corbin, Ky., is the principal gathering point through which most of the coal passes en route to Knoxville, although there is some concentration at Loyall, Ky. The coal gathered at Corbin includes that from all of group 2 and most of group 3. Coal from the remaining mines, primarily in group 4, is gathered at Loyall, from which traffic to the considered destinations passes through Corbin and thence through Knoxville. During a 1-week study of these movements, 400 cars were loaded at 38 different mines served from Corbin, and 263 cars originated at 27 mines served from Loyall, or a total of 65 mines out of a possible 127 in the origin territory.

Although not used exclusively for coal movements to the Carolinas in connection with the Southern, the L. & N. Corbin freight yard operates 16 yard-engine shifts every 24 hours, 1 shift concentrating on switching empty cars and making up trains for mine runs and 2 shifts devoting their entire time to weighing and classifying loaded cars delivered to Corbin from the mines. The gathering operations at Loyall require seven mine runs and six yard switching crews daily. At Knoxville, the L. & N. uses an 8-hour

switch engine shift every day to perform the interchange operations with the Southern.

From time to time, the L. & N. must extend its branch lines to undeveloped coal areas to maintain its tonnage as working areas become depleted. In the Jellico-Middlesboro Group, 114 mines which produced slightly more than 33,000 carloads in 1926 have been abandoned, as have 55 in the Harlan Group which were the source of over 128,000 carloads in that year. An example of branch construction is the 11-mile extension constructed during 1946 on what is known as the Clover Fork branch in Kentucky. The cost was $1.3 million. This extension produces an additional 6,000 carloads per year, bringing the total annual volume on the Clover Fork branch to 15,000 cars. The original branch in 1936 produced 106,000 carloads. However, total production in the field appears to be steady, as evidenced by the fact that 32,885,359 tons were produced in 1925 and 33,316,565 tons in 1958.

In contrast to the movement of traffic generally, in which equipment is provided more or less proportionately by all lines participating therein, the L. & N. as the originating carrier of the considered coal furnishes all of the cars used. To its fleet of almost 60,000 freight cars, including about 32,000 hopper cars and 6,000 gondolas, the L. & N. added 1,700 new 70-ton hopper cars in 1959 at a cost of over $10,000 each. Its depreciated investment in cars used for hauling coal, including the new cars, exceeded $160 million at the end of 1959. At current prices, the replacement cost of the L. & N.'s 32,000 hoppers with 70-ton cars having the same aggregate capacity would exceed the current book value of its entire fleet. Based on a 30-year depreciable life for coal cars, the L. & N.'s program for replacing its fleet with newer cars progresses at the rate of 3.33 percent per year.

Virtually all of the cars are returned empty to the L. & N. Of the 621 cars in the 1-week study during November 1958.

the Southern, for its convenience, released 51 of the cars to the L. & N. at Atlanta, Ga., 188 miles from its original pickup point of Knoxville, thereby increasing the L. & N.'s costs in returning the empty cars to the mines.

Delivering line.—As shown by a study on one day in November 1958, considered by the Southern as typical, L. & N. cars loaded with coal were delivered to destinations by 19 trains consisting of from 55 to 165 cars, with no more than 15 of those coal cars in any single train. In no instance did this traffic amount to as much as 25 percent of a train's consist. It was used as fill-out traffic. The Southern points out that the L. & N.'s 1957 traffic study of almost 24,000 cars moving to 192 destinations, showed an average of 125 cars per destination, or only 2.4 cars a week. It emphasizes the burdensome character of such small deliveries at numerous points, the use of local trains for much of the traffic, and the need to maintain a large number of switch engines at various terminals as compared with the relatively concentrated area in which the coal originates. However, a yearly average of this sort is misleading because certain destinations received only a few deliveries during the year, while the principal consuming points received substantial and continuous coal shipments. The Southern has also borne certain expenses of encouraging the industrial development of the territory it serves by investments in its lines and by actively soliciting coal traffic.

Turnaround time.—The Southern objects to the 19.73 days shown by the L. & N. as the car turnaround time in connection with the coal movement via Knoxville, as being based partially on the latter's systemwide average on coal traffic rather than for any special study as to the cars involved. According to the Southern, the turnaround time varies between 14.7 and 16.61 days. There is no substantial dispute as to the time on the Southern, both parties assigning slightly over 7 days for the defendant. The L. & N. shows the time on its line as 5.5 days, while the Southern claims that this time is 2 days longer. The L. & N. maintains

further that another 7 days is idle or nonproductive time. The Southern makes no provision for idle time. It appears, however, that equipment used in the transportation of coal is subject to some idle or nonproductive time, if for no other reasons, because of variations in demand, labor strikes, and the shutdown of mines for an annual 2-week vacation. In addition, in the normal process of mining coal, certain size coal is loaded for which the mines have no immediate orders, and these cars are left at the mines without charge until sold and billed to the purchaser. It is necessary to perform additional switching in order to separate these so-called no-bill cars from traffic that is ready to move. A 1-week study of no-bill cars on a particular L. & N. division showed 486 such cars at the mines, plus another 50 held in the Corbin yards. We conclude, therefore, that idle time should be included in the turnaround time and that the 19.73 days shown by the L. & N. represents a more accurate statement of the turnaround time on coal movements through Knoxville to the Carolinas.

Operating conditions.—Various comparisons of the grades and curves encountered in transporting the traffic were presented. The defendant asserts that these line-haul as well as switching and other terminal conditions, including certain congested streets and grade crossings, and restrictive city ordinances it faces at some destinations, in connection with the traffic are comparatively less favorable than those of the L. & N. While an appraisal of the evidence regarding physical operations indicates that both the complainant and the defendant operate in mountainous terrain, there is no need to determine whether such transportation conditions are more favorable or onerous to one than to the other. The nature of the physical transportation circumstances is concededly reflected in the cost of operations. In this respect, the cost data hereinafter discussed form a sounder basis for a determination of the issue raised than any conclusions to be drawn from the numerous factual statements regarding operating conditions.

Ton-mile earnings.—On a ton-mile basis, the L. & N.'s earnings from its current division of rates compare favorably with the ton-mile earnings of certain of the Pocahontas lines on similar traffic. They operate in the same general area, and the Southern presented evidence to show that the physical conditions of the L. & N. route are comparable to those on the Pocahontas lines. However, this does not prove that the L. & N. obtains the proportionate division to which it is entitled over this particular coal route in connection with the Southern, especially on a cost and service performance basis.

Revenue needs.—The examiner's recommended report considered numerous comparisons of rates of return and other earning data for both parties. According to the Southern, the report lacked, among other things, comparisons of the retu.. on net property investment from 1946 through 1958 of class I railroads generally and of all coal carriers with the rate of return of the L. & N. The rates of return of carriers generally which are not participating in the division of the joint rates in issue are not of any great significance.

The Southern claims that the low rates of return of the L. & N. for 1957 and 1958 are not representative, because those were recession years. A downward trend in the L. & N.'s rate of return reached a low of 2.74 percent in 1958. The following table compares the rates of return of the complainant and the defendant from 1950 through 1958:

Year	L. & N.[1]	Southern
	Percent	*Percent*
1950	5.37	4.97
1951	4.79	4.11
1952	5.27	5.31
1953	5.97	6.03
1954	4.26	5.00
1955	4.75	6.95
1956	4.47	6.48
1957	3.49	5.65
1958	2.74	5.19

[1] Including Nashville, Chattanooga & St. Louis Railway (N.C. & St. L.).

As above shown, the Southern's rate of return during this period was generally greater than that of the L. & N. Both experienced declines in 1957 and 1958. Both parties voluntarily selected 1957 and 1958 for their traffic studies, and, as their relative situations remained the same, we will consider such periods as representative. Prior to the 1950's, the L. & N. generally enjoyed a better net income position than did the Southern. The rate of return for the period from 1921 through 1958 was 4.50 and 4.46 percent for the two lines, respectively.

The Southern objects to the fact that the L. & N. included data for the N.C. & St. L. in its rate of return for years prior to 1957, which was prior to the merger of the latter into the L. & N. None of the coal involved in this proceeding originates at mines located on the lines of the former N.C. & St. L. The effect, however, of including the N.C. & St. L. data was to decrease the L. & N.'s rate of return an average of only slightly more than one-fourth of 1 percent. The factors chiefly contributing to the L. & N.'s declining rate of return since 1953 have been expenditures for roadway maintenance, a dieselization program, a long strike in 1955, large purchases of freight cars in recent years, and tax accruals, aside from the book adjustments following the merger of the N.C. & St. L.

According to the Southern, the present L. & N. divisions to Knoxville have an inconsequential effect on the latter's overall rate of return, referring to the fact that the particular traffic constituted less than 4 percent of its total coal tonnage, and less than 1 percent of its total revenue in 1957. However, a fair division of the joint rates does not necessarily depend on the relative importance of the Knoxville coal traffic to the systemwide movement of all L. & N. freight.

According to the Southern, the L. & N.'s financial benefit from the coal traffic is shown by large credit balances for freight car rental in its favor. For example, during the most recent 10-year period showing the respective credit

balances for the use of interchanged cars on operations generally, the Southern has sustained a debit of almost $3.4 million, compared with a credit to the L. & N. of about $11 million. As distinguished from those totals, the per diem rental charge paid by the Southern to the L. & N. in 1957 was $2.75 per car, which was established to return to the owning line the nationwide average reproduction cost of all cars based on December 31, 1955 prices. The L. & N. has upgraded its fleet to a considerable extent within recent years, with the result that average age per car has decreased from approximately 18 years on January 1, 1957, comparable to the nationwide average at that time, to somewhat over 13 years.

Efficiency of carriers.—The Southern takes the position that its efficiency results in greater productivity, while the L. & N.'s alleged managerial inefficiency with respect to maintenance of its physical plant, use of equipment, and method of operating contributes to lower productivity and results in lower revenues. Accordingly, the Southern regards the proposed division of joint rates which would reduce its proportionate share as penalizing it for efficiency and, at the same time, as rewarding L. & N. for what the Southern contends is its inefficient operations.

In support of its position, the Southern compares various efficiency factors. For example, in order to compare the density of traffic moving over the respective lines, gross ton-miles per freight-train hour produced in 1957 are used. While the parties hereto are shown below to be less favorably situated than certain other railroads, nevertheless the differences between the L. & N. and the Southern are much less pronounced.

Railroad	Gross ton-miles per freight-train hour	Gross ton-miles per man-hour of employment	Wage costs per 1,000 gross ton-miles
L. & N.	50,892	745.5	2.75
Southern	53,194	914.3	2.58
Virginian	72,365	1,355	1.53
N. & W.	87,452	1,111	1.83
C. & O.	77,992	1,003	2.26

In 1957, the L. & N. handled 2,760 gross tons per train, with an average of 59 freight-carrying cars per train, while the Southern handled over 3,000 gross tons per train, averaging about 72 freight-carrying cars per train. In 1958, the average load per car was about 39 tons on the L. & N. and 32 tons on the Southern, and net ton-miles per train-hour on the L. & N. were 25,428, compared with 24,517 on the Southern. In *Florida East Coast Ry.* v. *Atlantic Coast Line R. Co.*, 235 I.C.C. 211, 231, the Commission considered statistical comparisons of this kind but observed:

> However, it is difficult to appraise the efficiency of a carrier solely by the comparison of mere figures—too many varying conditions and circumstances enter into the equation to permit it to be said with mathematical certainty that this or that carrier is more efficiently operated than another.

This comment is pertinent here with respect to the use of statistical data showing efficiency factors as a means of establishing that one carrier is more efficient than the other, or in support of the Southern's contention that greater productivity on its part is, in fact, reflected in the efficiency factors set forth above.

The L. & N. did not complete its dieselization program until 1956, but by 1954 over 90 percent of its locomotive-miles were operated by diesel units. On the Cumberland Valley Division where the Carolina coal movement originates, conversion to diesel power was completed in 1955. The L. & N.'s highest net income in the past 10 years was earned in 1953, prior to complete dieselization, when it amounted to $30.6 million, while the lowest earnings resulted during the period 1957-59, after complete dieselization, when net income ranged from about $13.2 million to $19.4 million. The L. & N. compares favorably with the Southern on the volume of traffic handled, as indicated by the handling of 791 net ton-miles per car-day on all traffic in 1958, compared with the Southern's 817. This showing is particularly significant in light of the L. & N. system aver-

age turnaround time on all traffic of 19.45 days per trip and its ratio of empty-car miles to loaded-car miles of about 73 percent compared with 60 percent for the Southern.

In 1958, the L. & N.'s labor expense of approximately $124 million, slightly more than 54 percent of railway operating revenues from all services, was greater than that of about $108.5 million for the Southern, or 42 percent of total operating revenues. The merged L. & N. and N.C. & St. L. employed about 21,000 employees, compared with almost 18,000 employees on the Southern. The L. & N. maintains a larger car fleet than the Southern, requiring a proportionally larger labor force. In any case, we cannot attribute the L. & N.'s expenditures for labor to managerial inefficiency as contended by the Southern.

The Southern attributes its better wage ratio not so much to the type of traffic handled as to the mechanization of such functions as maintenance-of-way and clerical, plus the construction of new pushbutton yards. A similar program has now been undertaken by the L. & N., which should produce operating efficiencies. The Southern anticipates considerable savings by the L. & N. of more than $23 million if an improvement in labor efficiency can be realized which is comparable to that accomplished by the Southern, and claims that the resulting increase in net earnings should be considered in determining the need for increased divisions by the L. & N. However, the increase sought by the L. & N. is based largely upon the respective service contribution of these carriers to the instant coal movement.

The L. & N. increased its road maintenance and modernization of equipment and structures approximately 25 percent during the period 1950-57, with practically no change in its traffic pattern. It increased expenditures for cars from $4.2 million in 1955 to almost $33 million in 1958. Overall, from 1947 through 1958, the L. & N.'s expenditures for road and equipment additions and betterments exceeded

$400 million, compared with those of the Southern of approximately one-fourth less. It is clear that the L. & N. has been striving for increased efficiency even though net revenues have declined. The L. & N.'s expenditures on improvements were greater although it obtained total income which was $90 million less, and net income which was $40 million less, than that of the Southern.

The Southern contends that the refusal of the L. & N. to use the short-line route from the mine origins to Middlesboro, Ky., and to interchange there with the Southern, is evidence of inefficient operations. This claim is based on the fact that the average short-line distance from the L. & N. group 3 and 4 mines over the Middlesboro route to Knoxville is 108 miles, while the short-line distance via Corbin is 148 miles. The weighted average distance from all mines via Corbin is 156.7 miles. The Southern claims that the short-line distance should provide the basis for the L. & N.'s division of rates. No through route has been operated via Middlesboro for more than 30 years. The record indicates that there are no appropriate or sufficient facilities for the interchange of traffic in volume via that point, that adverse terrain and grades exist in the area, and that extensive additional investments would be required to make Middlesboro the interchange point, duplicating to a large extent facilities available at the gathering points of Corbin or Loyall. In any event, since the loaded cars originating in the involved territory would have to be segregated at the latter points for movement via Middlesboro, there would be added mileages, burdensome backhauling, disruptions of service, and the addition of new trains, thus increasing the total expenses incurred over the present route. We conclude that the use of Middlesboro would neither be feasbile nor would it enhance efficiency.

The Southern claims also that another example of the L. & N.'s inefficiency was the consolidating of certain origin groups, resulting in the eliminaton of a rate differential. However, it appears that this action was largely dictated

by competition and it was a step also toward a more competitive and simplified operation.

The respective operating ratios of the L. & N. and the Southern for 1958 were about 83 and 73 percent. For the 11 years 1948-58, the L. & N.'s average operating ratio was 70 percent, and the Southern's 62 percent. The Southern contends that those ratios provide an overall index of its superior operating efficiency and the L. & N.'s inefficiency. However, the explanation for the discrepancy in operating ratios can be understood in the light of their respective operations for 1958, when the L. & N. carried approximately 11 million more tons of freight than did the Southern for approximately 1.75 billion more ton-miles, yet it received $23 million less revenue. The reason for the seeming discrepancy between the total traffic and revenues of the carriers is that coal, a low-revenue producing commodity, constituted nearly one-half of the L. & N.'s traffic, but only about one-fourth of the Southern's freight. On the other hand, over one-third of the Southern's traffic consists of the high-yield manufactures and miscellaneous commodity group, compared with slightly less than one-fourth on the L. & N. The out-of-pocket cost per short-line ton-mile of handling manufactures and miscellaneous commodities in the South in 1957 was only about one-third higher than the cost of handling bituminous coal, but the revenue produced by the former was 100 percent higher than that from coal.

The operating ratio of the L. & N. is considerably higher than the ratios of the Pocahontas lines. In 1957, for example, the freight operating ratio of the L. & N. was about 77 percent, while those of the Pocahontas lines ranged from 49 to 68 percent. These low ratios on the Pocahontas lines are, however, attributable to their high traffic density. Comparison of the L. & N.'s results with those of railroads in the southern region generally for approximately the same periods shows little difference in average revenue per ton-mile. Consideration of traffic density as an element of the operating ratio is of limited significance here, since the

Southern and the L. & N. are on almost equal footing in this respect.

Cost of service.—Extensive cost data were submitted by both carriers, each using substantially the same basic information and the so-called Rail Form A, but with different modifications and adjustments. A detailed description and analysis of the cost evidence is contained in the examiner's report and need not be repeated herein. We adopt the substance of the examiner's findings concerning costs in all material respects. Accordingly, we shall confine our own discussion relating to costs mainly to those principal matters raised by the Southern on exceptions.

The ultimate conclusion to be drawn from that evidence is that as to the movements of this coal traffic, the L. & N. bears 47.64 percent of the out-of-pocket costs and the Southern bears 52.36 percent, and that as to the fully distributed costs the respective percentages are 47.05 and 52.95. These figures are based on the complainant's final restatement of the costs which we find to be reasonably and sufficiently reliable and acceptable for the purposes of this case. They result from the application of various unit costs, computed mainly on the basis of the 1957 operations of the carriers, to the most recent traffic study of record covering the previously described coal movements during 4 months in 1958 to 168 destinations. Appendix A contains a table comparing the costs of the L. & N. and of the Southern based on the 1958 study.

In the absence of any definite information of record as to the exact apportionment of the car costs as between line-haul and terminal services, such costs were included in those assigned to the latter. This approach seems proper here and does not distort the costs to any great extent, in view of the relatively short hauls and the lack of any wide variation between the weighted average distances over the respective lines. Thus, the out-of-pocket costs for terminal services are shown to be about 75.83 and 76.69 cents per ton

and for line-haul about 0.436 and 0.420 cent per ton-mile, for the L. & N. and the Southern, respectively. The corresponding figures on a fully distributed cost basis are about 92.48 and 93.47 cents per ton and about 0.598 and 0.59[illegible] cent per ton-mile. The line-haul fully distributed costs for both carriers are substantially the same mile for mile.

The Southern objects particularly to the use of reproduction car costs as reflected in the above-mentioned cost of service percentages for the L. & N. and per diem costs for the Southern. It points out that complainant's cost study uses the reproduction basis for only two accounts—freight train car portion of shops and engine houses and freight train cars—and that original costs are used for other properties. Such accounting is characterized as a "mongrel type" of accounting procedure. As the L. & N. furnishes all the coal cars used in the Knoxville movement, the per diem charges paid by the Southern for these cars is the only actual cost of these cars to the Southern, and must be used in determination of the Southern's costs. The per diem charges paid by the Southern were determined upon a reproduction cost basis. The use of reproduction cost for L. & N. cars, which is readily ascertainable here, makes comparable these costs as between the complainant and the defendant placing them on an equal footing. It is, therefore, appropriate in these circumstances to deviate from Rail Form A. As to other facilities and equipment, both carriers use their own respective properties, and the usual method for determining depreciation and return on investment based on original cost accords the same treatment to the two carriers.

In computing its costs, the complainant used the weighted average haul of about 156.7 miles from origin points on the L. & N. to Knoxville, including backhaul. In constructing the defendant's costs, a distance factor of about 194.5 miles was used which, as previously explained, represented the weighted average haul to the 168 destinations receiving coal during the 1958 traffic study. The defendant, on the other

hand, in its computations of the complainant's costs used the simple average of 148 miles to Knoxville and for its own costs applied 266 miles, which is the simple average distance to the 53 principal destinations in the 1958 study. All of the above line-haul mileage figures exclude terminal switching miles.

The Southern urges the use of simple average distances, and objects to the use of weighted averages because this latter method of determining distances takes into account each car that moves instead of merely the points to which there is a joint rate published, and as to which prescribed divisions are sought. The defendant rejects the view that, based upon the movements studied for 1957 and 1958, showing generally similar characteristics as to average hauls, it can be reasonably expected that the present traffic pattern will not change significantly in the future. It claims that the use of weighted average distances constitutes a "short term approach" to the involved issue.

Neither rail carrier herein determined the distances, whether on the basis of simple or weighted average miles, to all of the 658 possible destinations in the Southern's territory. To do so would not have been very significant, in view of the showing of coal movements to only 193 and 168 destinations, during 1957 and 1958, respectively. Further, the use of simple average miles as a means of reflecting possible future changes in the coal traffic from the L. & N. mines to the Southern's destination territory is speculative, and no basis for such determination is found on this record. In this proceeding we are dealing with a single commodity and a relatively limited origin area. Weighted average miles shown by the complainant reflect with greater accuracy the distance factors as they relate to the actual transportation as performed in recent years, while the simple averages represent hypothetical conditions. We conclude that the former method is proper for use in the ascertainment of the cost of service.

In order to offset the empty-return ratio of 108.6 percent shown for the L. & N., resulting from the return of empty cars at Atlanta, rather than at Knoxville, the Southern refers to the number of cars returned to the L. & N. at Knoxville after they have been transported loaded over the Atlanta route. Although the return at Knoxville of cars which moved loaded via the longer Atlanta route may affect the costs of complainant over the latter route and, generally, of all coal traffic, this fact has no effect on the L. & N.'s costs for the transportation of coal via Knoxville. The 108.6-percent empty-return ratio was properly used since it specifically and directly affects the determination of the complainant's costs for the Knoxville movements which are here under consideration

The defendant included in its exceptions a new restatement, with a lengthy explanation and detailed tabulations attached thereto as an appendix, purporting to show that the 1958 out-of-pocket costs on a mileage-time basis, even if computed on the weighted average distances, would result in the Southern bearing 64.22 percent of such costs, as compared with 35.78 percent for the L. & N. Aside from the fact that the defendant still insists on using the original cost basis on the coal cars of the L. & N. (which basis, as previously noted, is deemed improper for comparative purposes with the car per diem charges used for the Southern), this restatement and the supporting data are objected to by complainant as constituting in part new material. The L. & N.'s lengthy point by point reply to the restatement clearly shows that any new material therein is of a rather inconsequential nature. However, in evaluating this restatement, we find in it the same basic deficiencies as found in defendant's earlier cost studies and, therefore, it is of little value.

The following table depicts the respective costs of the carriers, based on the 1958 study projected to a full year, as compared with the revenues derived by each under the existing divisions as settled which are also adjusted to re-

flect an annual basis. In addition, there are shown distributions of revenue as between the parties, based separately on the out-of-pocket and fully distributed cost percentage relationships.

	L. & N.	Southern	Total
Out-of-pocket costs	$1,889,934	$2,077,092	$3,967,026
Percent	47.64	52.36	100
Fully distributed costs	$2,442,576	$2,748,381	$5,190,957
Percent	47.05	52.95	100
Present revenue distribution	$1,754,727	$3,150,108	$4,904,835
Percent	35.78	64.22	100
Revenue distribution on out-of-pocket cost proportions	$2,336,663	$2,568,172	$4,904,835
Percent	47.64	52.36	100
Revenue distribution on fully distributed cost proportions	$2,307,725	$2,597,110	$4,904,835
Percent	47.05	52.95	100

General Discussion and Conclusions

The examiner found that the existing divisions are unjust, unreasonable, and inequitable; that just, reasonable, and equitable divisions of the joint rates should be divided on a mileage prorate, plus 150 miles for the originating line and 50 miles for the delivering line, using for the L. & N. specified weighted average distances from the mining groups involved to Knoxville, and for the Southern actual distances beyond to destinations; and that retroactive adjustment of divisions to the date of the filing of the complaint should be denied.

On exceptions the Southern contends, among other things, that the examiner erroneously and without proper supporting findings would transfer annually from the Southern to the L. & N. over $917,000, of which at least $450,000 is based on an alleged revenue needs theory and the remainder on an inflated cost basis, and thus would penalize efficiency and reward inefficiency. It further asserts that there is no warrant here to tear down the base group method for dividing divisions which has long been in existence and recognized by coal carriers as reasonable and

proper. In reply, the complainant maintains that it has met its burden of proof, that the contentions of the defendants are without merit, and that the record justifies the findings of the examiner. It requests that the findings of the examiner be upheld and be made retroactive to the date of the filing of the complaint. On the other hand, the defendant urges that there are no valid reasons for this latter action.

Section 15(6) requires that in prescribing and determining divisions of joint rates—

> the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint, fare or charge.

The weight to be given to any of the factors enumerated in the statute must necessarily depend upon the case under consideration, and the evaluation of the importance of the various factors is peculiarly within the purview of the Commission. *Boston & M. R.* v. *United States,* 208 F. Supp. 661 (D. Mass. 1962), aff'd 371 U.S. 261.

In our opinion the previously noted statistics and other evidence regarding efficiency does not substantiate the allegation of the Southern that the operations of the L. & N. are conducted inefficiently or wastefully, nor will it support any finding that the latter line is in any way mismanaged. On the contrary, there is ample evidence showing that the L. & N., for approximately the past 10 years, has taken concrete steps and made a concerted effort to improve its overall

service. We find that both the L. & N. and the Southern are generally being operated efficiently and that, as to the particular traffic and issues involved, neither should be considered as more or less efficient than the other. Similarly, the record does not indicate that there are any substantial differences between the parties as to the importance to the public of their respective transportation services; and neither carrier is shown to be a weal line or to be in financial distress. Any change in existing divisions must be based primarily on cost of service considerations.

The costs, as restated by the complainant and accepted here by us, accord weight to and reflect substantially all of the services provided by the respective carriers. Reflected therein are certain allowances for return on property, including the modified reproduction basis for the cars of the L. & N. which gives proper effect to the originating carrier's role of supplying all of the cars for the movement of this coal traffic. Other operations peculiar to the complainant, such as gathering, switching, and holding idle cars, have been taken into account. Any construction of lines to new mines, to the extent that it involved investments by the L. & N. in road property, is already represented in that portion of the property of the L. & N. for which an allowance is provided; and to the extent that such new lines involved additional operating expenses, they are also incorporated in the costs. In any event, the only substantial evidence concerning the extensions of lines relates to one occurring in 1946, but without any specific factual indications as to other past, current, or continuing requirements with respect to such construction. Moreover, the considered Knoxville traffic constitutes less than 10 percent of all the coal cars originating in the involved mining area. Similarly, all of the operating conditions encountered by the Southern in the transport of coal are reflected in its own costs.

The question of divisions involves the making of practical judgments rather than the solving of a problem with mathematical precision. See *Boston & M. R.* v. *United*

States, supra at page 675. The instant record contains adequate cost data affording us a reasonable basis for the exercise of that practical judgment. In our opinion, every thing else being substantially equal, the relative costs of the parties reflecting their respective operations may properly serve here as a guide for the determination of equitable divisions. We see no justification for adding thereto any special handicap or advantage favoring one carrier over the other.

The Southern urges that the L. & N.'s portion of the rates should be determined under the existing method, solely by the distance of 40 miles to Knoxville from the base group, adding thereto pertinent rate differentials when the traffic originates in other mine groups. It is alleged that in the base-group and differential method of making coal divisions, the originating carrier has complete control over the establishment of its base and related groups, including the determination of the size of the mine groups and the measure of the differentials which should apply, disregarding the fact that in some instances such matters have been prescribed. Under this method, the destination carrier always receives the same amount of divisions for its service in handling coal traffic to a particular destination, regardless of the origin group. Application of that principle to the instant joint through rates, as noted, operates to the disadvantage of the L. & N., producing revenues which are not in proportion to the amount and cost of service performed by it. For example, the increase in the L. & N.'s revenue produced by differentially increased group 3 rates over those from group 2 is about 10 percent, while its costs from the former group are approximately 20 percent greater than from the latter. From group 4 the revenues increase 18.5 percent while the costs are 30 percent greater. In comparison, the Southern's proportionate share of the revenue ranges from 18 to 39 percent greater than its share of the expenses on traffic from origin groups 2 through 4. As mentioned, from these same origins, excluding group 1

because practically no coal moves therefrom, the L. & N.'s division of revenues ranges from about 32 to 38 percent, while its burden of the total expenses averages roughly one-half. Moreover, the pattern of the traffic, as seen, has changed since 1918 both as to distance and volume.

In numerous divisions cases, rates have been divided in a manner reflecting the relative services performed by the originating and terminating carriers. See, for example, *Official-Southern Divisions*, 287 I.C.C. 497 (1953). Use of the base-group differential method for ratemaking purposes is well recognized in connection with coal rate structures. However, divisions must be based largely on considerations of the relative services performed, revenue need, efficiency of operation, and other factors specified in section 15(6) of the act. The constant proportions allocated to the terminating carrier under the existing base-group differential method advocated by the Southern may be appropriate under circumstances different from those before us. Here, however, it does not result in just, reasonable, and equitable divisions.

The evidence clearly demonstrates that the existing method of divisions does not produce sufficient revenues for the L. & N. to cover its out-of-pocket costs, the defict shown for 1958 being $135,207. On the other hand, those of the Southern exceed such costs by over $1 million, or by almost 30 percent. Clearly, each carrier should at least receive sufficient revenues to reimburse it for its reasonable out-of-pocket costs in order to avoid confiscation. The present method of dividing revenues does not meet this minimal requirement.

The basis recommended by the examiner would have increased the L. & N.'s 1957 revenue by $917,841. This would change the previously indicated division-percentages of about 38 and 62 to about 57 and 43 for the L. & N. and the Southern, respectively. Applying the latter percentage split to the 1958 traffic study projected to a full year, the

L. & N. would receive about $2,800,170, as against $2,104,665 for the Southern, resulting in an increase of $1,045,443 for the L. & N. and a decrease in the same amount for the Southern. Complainant's revenues would then be $910,236, or 48.16 percent, above its out-of-pocket costs, as compared with only $27,573, or a mere 1.33 percent, for the Southern.[5] Clearly, this is also not a fair result, for it tends to reverse the positions of the parties, though not quite to the same extent as under the existing divisions.

The difference in the percentage relationship between the carriers on the fully distributed, as compared with the out-of-pocket cost basis is only about six-tenths of 1 percent. Whether one or the other of these cost bases is used here would therefore produce only a slightly different result. Nevertheless, we agree with the Southern's contention that fully distributed costs should be considered here in determining divisions. Constant costs are unavoidably incurred by a carrier as a result of its transportation operations but without regard to the amount of service performed. Being unrelated to service units, they are arbitrarily assigned on an average statistical basis. Such costs must however be recovered. They are, therefore, significant here since revenues derived from divisions ought to contribute a fair and proportionate share of the overall burden of each of the two carriers. Accordingly, under the circumstances presented herein, we conclude that fully distributed costs should be used.

Utilizing the unit costs for line-haul and terminal services as shown in appendix A, a mileage scale of divisional factors has been devised reflecting the relative fully distributed

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[5] The Southern in its exceptions assumed that the increase in revenue for the L. & N. and the decrease for the Southern under the recommendations of the examiner would be the same for 1958 as for 1957; and, accordingly, concluded that the percentages of the revenue above out-of-pocket costs shown for 1958 would be 41.5 and 7.4 for the L. & N. and the Southern, respectively.

costs of the carriers and is set forth in appendix B. The scale gives due weight to all material factors, including distance, for any prospective hauls on either line. Applying this scale to the 1958 traffic study projected to an annual basis, and using the weighted average distances, there would be a shift of about $540,000 from the Southern to the L. & N. The effect would be that each carrier would receive divisions closely corresponding to their relative costs reflecting approximately 47 percent for the L. & N. and 53 percent for the Southern. Each carrier would obtain sufficient revenue to cover all of its out-of-pocket costs plus a substantial contribution to constant costs. In the case of the L. & N. this contribution would amount to about $418,000 and in the case of the Southern to $520,000 for the 1958 operations. The revenues resulting from the divisions would exceed the out-of-pocket costs of the L. & N. by about 22 percent and that of the Southern by about 25 percent. However, in both instances the revenues would cover almost all, or approximately 95 percent, of the fully distributed costs of each of the carriers, whereas under the existing divisions the Southern's revenues exceeded such costs by about $402,000 while those of the L. & N. failed to meet such costs by about $688,000.

In our opinion, the results achieved here through the application of the indicated divisional mileage scale based upon the relative fully distributed costs of the carriers will for the future be just, reasonable, and equitable, and we so find. The parties should be permitted, however, to negotiate and agree upon any other modified scale, devised on the same basis, but with different mileage blocks and factors or any other method they may deem appropriate. But in the event that they fail to reach agreement prior to the effective date of the order herein, the scale set forth in appendix B is prescribed to apply thereafter.

We find that the division of joint rates on bituminous coal from mines on the L. & N. in southeastern Kentucky and eastern Tennessee, to points on the defendants' lines in

North and South Carolina, and to Augusta, Ga., are and for the future will be unjust, unreasonable, and inequitable. We further find that just, reasonable and equitable divisions of the joint rates on the considered traffic will for the future be those determined by the above-mentioned mileage scale, without prejudice to the substitution of a modified scale agreed upon by the parties in accordance with the discussion above.

There remains for determination the request for retroactive adjustment of the divisions on lump coal to the date of filing of the complaint. The L. & N. admits that since reductions on fine coal, which coal constitutes the bulk of the movements involved, were made voluntarily, no basis for retroactive adjustment exists. It contends, however, that as to lump coal, to the extent that rates on such coal are on the basis prescribed by the Commission in the *Carolina Coal Consumers* case, *supra*, the general increases therein approved by the Commission do not take them out of the category of prescribed or approved rates as embraced within section 15(6). The language of the statute is plain that only as to joint rates which have been established "pursuant to a finding or order of the Commission," can a retroactive adjustment of divisions be applied. The presently effective rates on lump coal are the result of numerous ex parte general increases, including those authorized in Ex Parte Nos. 162 and 166, referred to in the *Carolina Coal Consumers* case, *supra*. The application of such increases was clearly and expressly merely permissive, rather than mandatory, and the resulting rates therefore do not fall within the scope contemplated by the quoted phrase. *Brimstone R. & Canal Co.*, v. *United States*, 276 U.S. 104 (1928). Furthermore, it appears that the formal findings and order in the *Carolina Coal Consumers* case, *supra*, did not deal specifically with most of the movements at issue here. See *Atchison, T. & S. F. Ry. Co.* v. *Baltimore & O. R. Co.*, 174 I.C.C. 321, 323 (1931). The present basis for the division of revenue has been in effect for over 40 years by

agreement of the parties. The record before us does not afford sufficiently valid grounds for requiring the retroactive adjustment of the instant divisions. Accordingly, we find that the request for retroaction adjustment should be denied.

It is ordered, That the complainant and the defendants, be and they are hereby, notified and required to cease and desist, on or before 45 days after service of the report and order herein and thereafter to abstain from asking, demanding, collecting, or receiving divisions of joint rates upon bases other than that hereinbefore prescribed.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission, division 2.

HAROLD D. McCOY
Secretary.

(SEAL)

Out-of-pocket and fully distributed costs (based on 1957 operations of carriers applied to traffic study for 4 months in 1958)—Continued

Line No.	Item	Source	L. & N.	Southern	Total
	(1)	(2)	(3)	(4)	(5)
12	Line haul—ton-mile cost	Exh. C-257, Table 18	111,450	150,410	
13	Total constant costs	L. 11 & 12	$ 184,214	$ 223,763	
	Fully distributed cost (See footnote 2):				
14	Terminal out-of-pocket and constant	L. 5 & 11	$ 404,298	$ 408,641	
15	Line haul out-of-pocket and constant	L. 8 & 12	409,894	507,486	
16	Total fully distributed costs	L. 14 & 15	$ 814,192	$ 916,127	$1,730,319
17	Cost proportions (percent)	L. 16	47.05	52.95	100.00
18	Tons	Exh. C-255 Sup. L. 4, Col. 2 & 3	437,196	437,196	
19	Ton-miles	Exh. C-255, Sup. L. 2, Col. 2 & 3	68,500,606	85,025,319	
20	Out-of-pocket terminal cost—cents per ton	L. 5 ÷ L. 18	75.83189	76.69055	
21	Out-of-pocket line haul cost—cents per ton-mile	L. 8 ÷ L. 19	.43568	.41996	
22	Fully distributed terminal costs—cents per ton	L. 14 ÷ L. 18	92.47523	93.46860	
23	Fully distributed line haul costs—cents per ton-mile	L. 15 ÷ L. 19	.59838	.59686	

Footnote 1

Line No.	Item (1)	Source (2)	Southern (3)
1	Car cost adjustment—fully distributed	Exhibit C-256, Sup., footnote 1	$ 18,342
2	Car cost adjustment—out-of-pocket	Exhibit C-255, Sup., footnote 7	16,603
3	Car cost adjustment—constant	Line 1 minus line 2	1.739
4	Car costs—out-of-pocket	Exhibit C-255, line 7, column 10	**174,644**
5	Car costs—out-of-pocket adjusted	Line 4 minus line 2	158,041
6	Conatant terminal costs	Exhibit C-257, table 18	75,092
7	Constant terminal costs adjusted	Line 6 minus line 3	73,353

Footnote 2

Fully distributed costs exclude passenger train service and LCL service deficits, (Both parties followed this procedure).

APPENDIX B

Scales of divisional factors

Mileage block (1)	L. & N. (2)	Southern (3)
0-19	98	99
20-39	110	111
40-59	122	123
60-79	134	135
80-99	146	147
100-119	158	159
120-139	170	171
140-159	182	183
160-179	194	195
180-199	206	207
200-219	218	219
220-239	230	231
240-259	242	243
260-279	254	255
280-299	266	267
300-319	278	278
320-339	290	290
340-359	302	302
360-379	314	314
380-399	326	326
400 419	338	338
420 439	350	350
440-459	362	362
460-479	374	374
480-499	386	386

INTERSTATE COMMERCE COMMISSION

Served July 26, 1962

* * *

No. 32784

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

v.

SOUTHERN RAILWAY COMPANY ET AL.

* * *

Recommended Report and Order By Examiner Albert E. Luttrell

* * *

The complainant introduced further evidence to show the relative costs for the entire movement of the involved traffic over the two railroads. This study also developed the distribution of the Knoxville coal revenues based on the relative amount of expense (i.e., cost proportions) borne by the L. & N. and Southern, respectively, in handling their separate portions of this coal movement.

The complainant in this study showed the computation of the unit costs for the Southern and the L. & N. based on the year 1957. The costs for the Southern's portion of the Knoxville coal traffic in this exhibit are based on the complainant's restated costs of the defendants application of the Rail Form A formula to that carrier's expenses, rents and taxes used in connection with the previous study. The complainant's costs for the L. & N.'s portion of the traffic are based on a similar application of the Rail Form A formula to this carrier's expenses. As in the previous study, the costs in this exhibit are shown on the full cost and 80 percent of full cost levels but, here, the out-of-pocket cost level, in accordance with the Rail Form A formula, is also shown.

The complainant's development of the three levels of costs gave three different treatments of freight-train car expenses, as follows: (1) All freight-train car expenses on a per diem bases for both the L. & N. and Southern; (2) All freight-train car expenses on a reproduction cost basis for the L. & N. and a per diem basis for the Southern; and (3) All freight-train car expenses on a Rail Form A expense basis for the L. & N. and a per diem basis for the Southern.

* * *

The defendants claimed that for every car that originated on the L. & N. in the involved traffic, there is a profit resulting from the rental of cars which accrues to the L. & N. when the car is on the Southern's lines. The defendants contended that the freight-train car expenses computed in accordance with the rail formula reflect car ownership costs but the rental income received from the Southern must be considered. The complainant developed the L. & N. freight-train car expense on a car-day basis to be $1.34. The defendants multiplied this cost per day by the 7.08 average days the L. & N. cars are on the Southern's tracks to arrive at a fullfreight-train car expense per car of $9.49 and an out-of-pocket freight-train car expense per car of $7.59 ($1.34 × 7.08 days = $9.49 × 80 per cent = $7.59). By deducting these amounts from the per diem income which the L. & N. receives from the Southern amounting to $20.39 per car ($2.88 × 7.08 = $20.39), the defendants claimed the L. & N. had a full cost rental profit of $10.90 per car ($20.39 — $9.49 = $10.90) and an out-of-pocket rental profit of $12.80 per car ($20.39 — $7.59 = $12.80).

The complainant's second study is basically a Rail Form A application with adjustments to reflect the special traffic characteristics of the two carriers participating in the involved coal movements. The unit costs thus developed were based on the 1957 operating expenses,

taxes, etc. of the two involved carriers and were applied to the service units derived from the 1958 four-month traffic study covering movements to 168 destination points in the Carolinas and Atlanta, Georgia.

* * *

The per diem charges and car costs for both the Southern and L. & N. were shown on three bases. For the L. & N. costs were shown on: (1) a per diem basis; (2) reproduction costs stated on a car-day basis and a time-mileage basis; and (3) original costs on a car-day basis and a time-mileage basis. The car costs on the Southern were computed on a per diem basis only for comparison with the various methods used for the L. & N.

In developing car costs the complainant used the figure $2.75 which was the per diem charge in effect in 1957, the year on which the carrier's expenses are based in the cost studies. In contrast, the defendants used the figure of $2.88 which is the per diem rate first effective in December 1959 and was first applicable for the full year 1960. In developing costs on a per diem basis for both carriers the complainant applied the $2.75 rate plus general overheads to the respective number of days the open hopper coal cars remain on each carrier's lines and then applied the resulting per diem charges per car to the total number of cars in the four-month traffic study to arrive at the dollar amount of costs applicable to each carrier. The average turn-around time per load per trip for the coal cars in the Knoxville movement was determined to be 19.73 days — 7.08 days on the lines of the Southern and 12.65 days on the L. & N. lines (19.73 — 7.08 = 12.65). The general overheads applicable to the per diem cars were computed to be 37 cents per car-day for the Southern and 19 cents for the L. & N.

The Rail Form A formula used by both parties in developing the costs of the two railroads does not provide for the substitution of car costs by per diem charges.

In fact, by replacing Rail Form A freight-train car costs, Groups I and VI, with the per diem charge, there is a duplication of a part of the per diem expense since many of these items of expense used to construct the per diem rate are included elsewhere than in the Groups I and VI expenses. The complainant stated that such duplication of expenses involves the following items: (1) interest and depreciation on freight-train repair facilities, (2) maintenance of such car repair facilities, (3) non-revenue portion of freight-train car repairs, depreciation, return, etc., (4) taxes on freight-train cars, (5) general expenses and (6) payroll taxes. The complainant found that the expenses thus duplicated constitute 10.814 percent of the per diem rate at the out-of-pocket level and 11.930 percent at the fully distributed level. The elimination of duplications of expenses in car costs reduced the total dollar costs in those instances where car costs were computed on a per diem basis. This changed the cost proportions of the carriers from those originally computed as well as the distribution of revenues and the amount by which the L. & N. revenues would be increased if apportioned on a basis of costs that include car costs on a per diem basis.

The complainant criticized defendants treatment of car-day costs wherein the per diem rate of $2.88 was used to compute Southern's costs and L. & N. Rail Form A out-of-pocket costs per car-day are applied to the L. & N. portion of the haul. The car-day costs thus determined were not comparable for a number of reasons.

The complainant pointed out that the car-day costs developed in Rail Form A, Group I freight train car expense—running, other than mileage cars for line-haul service and Group VI, for switching service, do not include all of the items of costs which are used in computing the per diem rate on the basis previously approved by the Commission. The complainant computed these items of costs to represent 10.814 percent of the effective per diem

rate when that rate was $2.75 per car-day. The effect would be a reduction of $29,727 and $16,603, in the costs of the L. & N. and the Southern respectively.

Another criticism of the defendants procedure by the complainant is the application of the overhead ratios constructed on a historical cost basis under Rail Form A procedures to the per diem level of car rentals developed on a reproduction basis, which tends to overstate these overheads. The complainant developed 37 cents per car-day as the amount of the overhead expenses in Rail Form A and added this amount to the effective per diem rate of $2.75 per car-day, or a total of $3.12 for the Southern. The corresponding amount for the overhead expenses of the L. & N. was 19 cents which, when added to the per diem rate, gave a total of $2.94 per car-day. When these car-day costs were multiplied by the respective days on each line and the number of carloads in the traffic study of 7,906, the results were aggregate car costs of $294,024 for the L. & N. and $174,644 for the Southern on a per diem basis. The car-day costs of the L. & N. were also restated to recognize the mileage and time separations for maintenance and depreciation used in Rail Form A and to compute depreciation and allowance for return on two bases: (1) reproduction cost and (2) original cost. Using a car-day basis, the car costs of the L. & N. were $178,043 on a reproduction cost basis and $143,020 on an original cost basis. When car costs of the L. & N. are computed giving recognition to the mileage and time separations, they become $157,654 on a reproduction cost basis and $125,231 on an original cost basis. The per diem basis for Southern's car costs was used in all of these comparisons, amounting to $174,644.

The complainant's restatement of the out-of-pocket costs applicable to the traffic study and the percentage distribution between the L. & N. and Southern are shown in the following table. The revenue as settled is also included.

Comparison of Revenue as Settled with Complainant's Restated Out-of-Pocket Costs for Various Treatments of Car Costs

Item	Complainant's restated out-of-pocket costs			Percentage Distribution	
	L. & N.	Southern	Total	L. & N. (Col. 2 ÷ col. 4)	Southern (Col. 3 ÷ col. 4)
(1)	(2)	(3)	(4)	(5)	(6)
Revenue as settled	$584,909	$1,050,036	$1,634,945	35.78	64.22
Complainant's restated total out-of-pocket costs:					
Per diem basis	716,232	692,364	1,408,596	50.85	49.15
Car-day basis					
Reproduction cost	629,978	692,364	1,322,342	47.64	52.36
Original cost	594,955	692,364	1,287,319	46.22	53.78
Mileage-time basis:					
Reproduction cost	609,580	692,364	1,301,944	46.82	53.18
Original cost	577,166	692,364	1,269,530	45.46	54.54

The Southern states that the L. & N.'s cost study makes numerous false assumptions and omissions in computing Form A costs. Examples of these alleged errors are: (1) two daily freight trains included in the L. & N.'s cost calculations have not operated since March 7, 1959; (2) loaded Interstate Railroad traffic from Dorchester Junction to Corbin via Loyall was not involved in the study; (3) L. & N.'s one-week study of the movement to Knoxville (November 14-20, 1958) was not representative; (4) no analysis of lump versus fine coal; (5) regular trains 42 and 44 were not considered in determining train weights and diesel units between Corbin and Knoxville and return; (6) L. & N. records do not support the use of 5 diesel units between Corbin and Loyall; (7) 70-ton hoppers were not considered in Form A costs; (8) errors in L. & N.'s switching costs; (9) L. & N. costs and statement 2-59 costs are not comparable; (10) errors in the Southern train weights.

Analysis of the L. & N.'s detailed adjustments to the Rail Form A system average costs of the two railroads and application of these costs to the involved traffic

indicates that the resulting cost to each railroad in handling their respective portions of this joint movement of coal has been refined to the greatest possible extent, commensurate with the information of record and in conformance with the generally accepted cost principles.

The evidence of record shows that the L. & N.'s cost witness used an aggregate train weight for the L. & N.'s trains involved in this proceeding of 4,845 tons, and that the Southern used in costing out on the L. & N. for the total movement, 4,844.5 tons, or a difference of one-half ton. The L. & N. system average tons for all trains is 2,801 tons. For the Southern, the L. & N. used for all the through and way trains, an average of 4,542 tons. The evidence further shows that where the number of diesel units were questioned they were reduced to one unit and that 56 carloads of coal via the Interstate Railroad and Dorchester Junction were included in the L. & N. cost study. While the Southern argued that the L. & N.'s study of November 14-20, 1958 was not representative of the movement to Knoxville, a witness for the Southern testified that the coal received from the L. & N. on November 20, 1958, selected from the L. & N.'s study, was a typical day's interchange. The L. & N.'s cost witness testified that he made no analysis of lump versus fine coal because there are no separate statistics for lump and fine coal on a territorial basis.

The Southern did not restate the complainants costs to show the effect of its foregoing criticisms but even if full weight should be given to all of the alleged errors the results would appear to be relatively small and negligible when compared to the Southern's error in overstating its actual car-miles by 43.5 percent.

Aside from any other consideration regarding the defendants' cost study, its method of computing freight train car costs, which include an unusually large net credit from car-hire accruing to the L. & N. tends to understate

the complainant's freight train car costs. The resulting distortions of the relative car costs to each carrier and the attributing of a greater amount of services to the Southern's costs than were actually performed and a lesser amount of services to the L. & N. which were performed by the use of mileages based on simple averages, precludes any relevance to the defendants' cost study as a basis for fixing the divisions in the involved Knoxville coal traffic.

The revised car costs under the Rail Form A time and mileage separation of the L. & N.'s expenses cause severe penalties to that road when compared with the Southern's car costs computed on a per diem basis. Depreciation and return on investment under the rail formula are computed on the basis of the original cost of the equipment. The per diem rate however contains an increment which is intended to cover the replacement of the retired cars at current prices. Since a large part of the L. & N.'s car fleet was purchased at much lower prices than the inflated prices of today, and the L. & N. being the supplying road for cars used in the Knoxville coal movement, the rail formula method distorts the normal car costs of the road owning the cars. Even when the L. & N.'s car costs are raised to a reproduction cost level under the time-mileage basis, such costs are still unduly depressed in comparison with the Southern's car costs on a per diem basis. This is due to the disparities between the cost factors used in the rail formula and those used in the computation of the per diem charge.

The car costs for the L. & N. computed on a car-day basis at the original cost of equipment level is likewise not equitable because, here again, no consideration is given the owning road for the replacement of obsolete cars at current inflated prices.

This leaves only two of the alternate treatments of car costs to be considered; i.e., (1) where both carriers' car costs are computed on the per diem basis and (2) where

such costs for the L. & N. are computed at the reproduction level on a car-day basis and the Southern's costs based on the per diem charge of $2.75.

In the first place, the complainant's use of the per diem charge of $2.75 for both carriers in computing car costs is proper, in that the expenses used in the cost studies were based on the year 1957, during which period the car rental charge was $2.75.

The complainant contended that to the extent that costs are used in the fixing of divisions between railroads, costs must be on a basis which is comparable and consistent. The placing of both railroads on a per diem basis in figuring car costs is consistent, but it is questionable whether the per diem basis applied to the L. & N. is a proper measure of its car costs.

In computing car costs for the Southern, the complainant applied the per diem charge plus overheads to the number of days the rented cars were on the Southern to arrive at a rental cost per car. This resulting cost per car applied to the number of cars involved, produces a fair estimate of the full costs to the Southern for the use of the L. & N.'s cars while they are on the Southern's lines. As far as the L. & N. is concerned, that road must be compensated for its capital investment in those cars, their maintenance and all the other elements of expense as well as risk connected with car ownership, but to apply the same procedure to the L. & N. to establish its car costs as were used to compute the Southern's costs, is not correct. The rental charges paid out by the Southern are actually income to the L. & N., so that to apply that income to the L. & N.'s portion of the turn-around time the cars are on its lines would produce unrealistic car costs.

The record indicates that after all actual car costs of the L. & N. are covered there is some part of the per diem receipts remaining since the L. & N. normally has large net credit balances each year in its per diem account. Of course, these net credits accrue from its entire fleet of all

types of freight cars and results from its rental payments to, and rental income from, all its connecting railroads. It follows that there is a spread between actual car costs of the L. & N. and rentals received from the Southern on the Knoxville coal traffic which covers compensation due the L. & N. as an owing road as well as a profit upon which income taxes must be paid.

The issue here concerns the establishment of the most equitable cost proportions of the two carriers in handling the total Knoxville coal traffic. The complainant's computation of the L. & N.'s car costs on a car-day basis at the reproduction level and with the Southern's car costs on the per diem basis accomplished that end. On this basis of computing the L. & N.'s car costs the complainant used the actual freight car expenses and return on investment with adjustments to increase depreciation and return to reflect the reproduction cost level. The procedures followed appear to be in accordance with generally accepted costing principles.

These car costs for the L. & N., using the actual expenses as a base and railed to the reproduction level, are comparable and consistent with the Southern's car costs based on the per diem charge which includes an increment to cover the cost of replacing cars at current prices.

This treatment of car costs for the two roads results in over-all out-of-pocket costs applicable to the four-month traffic study amounting to $629,978 for the L. & N. and $692,364 for the Southern, or proportionate costs of 47.64 and 52.36 percent, respectively, of the total cost of $1,322,342. The L. & N. received only 35.8 percent of the revenues but bears 47.64 percent of the out-of-pocket costs of the Knoxville coal traffic under previously described basis of treatment for car costs. Southern's share of the revenues, however, is 64.2 percent but only 52.36 percent is its proportion of the costs.

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 838

CAROLINA & NORTHWESTERN RAILWAY COMPANY,
ATLANTIC & EAST CAROLINA RAILWAY COMPANY,
STATE UNIVERSITY RAILROAD COMPANY
and
SOUTHERN RAILWAY COMPANY, - Appellants,

versus

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

R. WRAY HENRIOTT,
L. & N. Building,
Louisville, Kentucky 40201,
(Counsel of record on whom service should be made)

W. L. GRUBBS,
JAMES W. HOELAND,
ELBERT R. LEIGH,
JOSEPH L. LENIHAN,
L. & N. Building,
Louisville, Kentucky 40201,
Attorneys for Appellee, Louisville and Nashville Railroad Company.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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CAROLINA & NORTHWESTERN RAILWAY COMPANY,
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and
SOUTHERN RAILWAY COMPANY, - - *Appellants,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

MOTION TO AFFIRM AND BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Appellee, Louisville and Nashville Railroad Company (hereinafter called L. & N.), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the district court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

II.

BRIEF IN SUPPORT OF THE MOTION.

Restatement of the Case.

Appellants' statement of the case is misleading and, accordingly, a restatement thereof is necessary.

Appellants had been receiving a grossly excessive share of the revenue produced by joint freight rates on bituminous coal shipped from mines in Southeastern Kentucky and Eastern Tennessee on the lines of the appellee, L. & N., to destinations in North Carolina and South Carolina and Augusta, Georgia, via the L. & N. to Knoxville, Tennessee, thence Southern Railway Company, including in some instances three small subsidiaries of that company (hereinafter collectively called Southern or appellants).

Marked changes in the conditions surrounding the movement had taken place since the divisions of such joint rates were established some 40 years before, and these adversely affected the L. & N.'s revenue position. L. & N. sought to have Southern agree, in the light thereof, to a new basis of divisions. Southern refused to agree to any change[1] (Ex. C-12; Tr. 37-38).[2] Hence

---

[1]319 I.C.C. 639, 641, 643, 644, 659 (pp. 9a, 12a, 13a, 32a). Page numbers as just shown in parentheses in this footnote, without other explanation, refer to pages of the Jurisdictional Statement and its Appendices.

[2]The exhibits and transcript referred to are those which are a part of the record made before the Interstate Commerce Commission.

L. & N. was compelled to bring the action before the Interstate Commerce Commission to correct the unfair basis of divisions then existing.

The unfair situation that existed may be illustrated by citing movements from what are designated Group 4 mines to Canton, North Carolina, where the L. & N. performed 55.4 percent of the miles of service and yet received but 42.4 percent of the joint revenue, whereas Southern, performing 44.6 percent of the miles of service, received 57.6 percent of the joint revenue (Exs. C-37 and C-178).

Again to illustrate, from Group 3 mines to Asheville, North Carolina, L. & N. received only 41.3 percent of the joint revenue for performing 51.7 percent of the miles of service, whereas Southern received 58.7 percent of the joint revenue for 48.3 percent of the miles of service (Exs. C-37 and C-177).

For the entire movement during a four-month test period, L. & N. received but 35.8 percent of the joint revenue for performing 43.6 percent of the miles of service, while Southern received 64.2 percent of such revenue for performing 56.4 percent of the miles of service (Tr. 1158 and 1964).

Comparing revenue received with out-of-pocket costs incurred by each railroad in performing its part of the joint service, the L. & N. received but 35.8 percent of the joint revenue for bearing 47.6 percent of the out-of-pocket costs, whereas Southern received 64.2 percent of the joint revenue for bearing 52.4 per-

cent of the out-of-pocket costs[3] (Tr. 1158; Ex. C-255). Thus is was that the Commission expressly found:

> "The evidence clearly demonstrates that the existing method of divisions *does not produce sufficient revenues for the L. & N. to cover its out-of-pocket costs,* the deficit shown for 1958 being $135,207. *On the other hand, those of the Southern exceed such costs by over $1 million, or by almost 30 percent.* Clearly, each carrier should at least receive sufficient revenues to reimburse it for its reasonable out-of-pocket costs in order to avoid confiscation. The present method of dividing revenues does not meet this minimal requirement." (319 I.C.C. 639, 659-660. Italics added.) (p. 32a)

The L. & N. was thus inequitably treated notwithstanding that equities rested with it as the developer of the coal territory (Tr. 36, 88), the supplier of all the cars[4] (Tr. 42), the performer of all the originating services, and the bearer of other burdens falling to the lot of the originating carrier of coal.

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[3]For each mile of line-haul service, for each interchange and for each switching movement it may be calculated Southern was receiving 39 percent more than L. & N. (Tr. 1992, 1993).

[4]Southern, without any reference to the record, or any support therein, improperly asserts that the cars used were predominantly of an "obsolete" character (p. 6). The record not only does not support this representation but, to the contrary, shows that at the time of the hearing the L. & N. owned 31,662 hopper cars (Ex. C-43) used for the carriage of coal, of which 5,000 were new 70-ton capacity cars (Ex. C-28), and that in the course of the hearings before the Commission L. & N. acquired an additional 1700 such 70-ton capacity cars (Tr. 354). In the light of these figures and others appearing in the exhibits cited, the Commission found, at pages 648-649 of its report (319 I.C.C. 639):

> ". . . The L. & N. has upgraded its fleet to a considerable extent within recent years, with the result that average

(Footnote continued on following page)

After conducting exhaustive hearings, covering a period, in the aggregate, of seventeen days, which produced 2,441 pages of testimony and 264 exhibits, and after the consideration of elaborate briefs, the Commission found that the involved divisions of joint rates were "unjust, unreasonable and inequitable" and required a new basis of divisions to be established which would be just, reasonable and equitable (pp. 33a-36a).[5] This basis became effective on April 27, 1964, upon denial by the district court of Southern's application for a temporary restraining order and interlocutory injunction[6] pending decision of the suit on the merits. Thereafter, the three-judge district court decided, after comprehensive briefs and oral arguments, that the attack was without merit.[7]

No Substantial Question Is Presented.

Prefatory to their statement of questions presented, appellants charge that the Commission "relied solely upon the relative costs of the carrier parties to the joint rates" (p. 4). Exactly what is meant by this quoted language appears at pages 8 and 9 of the Juris-

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age per car has decreased from approximately 18 years on January 1, 1957, comparable to the nationwide average at that time, to somewhat over 13 years." (19a)

The movement on November 20, 1958, described by a Southern witness as a typical day's movement (Tr. 691, 824), indicates that the L. & N. delivered 108 cars of coal for movement to the involved destinations on that day (Ex. D-142). Of the 108 cars, 29—or 27 percent—were, at the time of movement, 70-ton hopper cars two years old or less (Exs. C-28, D-88). The ages of the other cars interchanged on November 20, 1958, do not appear of record.

[5] 319 I.C.C. 639, 660-662.

[6] 230 F. Supp. 581.

[7] 234 F. Supp. 112 (pp. 1a-4a).

dictional Statement, where Southern asserts that the Commission concluded "it need not take into account factors other than costs that Section 15(6) of the Interstate Commerce Act requires it to consider in establishing divisions" and that "the Commission decided the case solely on the basis of costs. . . ." The charge is altogether untrue. While the Commission did prescribe divisions in the light of its determination of relative costs of Southern and L. & N., it did not reach any such conclusion as that asserted by appellants nor decide the case by considering only costs. Rather, the fact is that it gave due consideration to all factors specified in Section 15(6) and to many other factors. Specifically, it took into account and gave due consideration to relative efficiency;[8] relative revenue needs;[9] relative importance to the public of the involved railroads;[10] whether such carriers were originating, intermediate or terminating carriers;[11] relative costs of their services;[12] importance of the particular traffic to the carriers involved;[13] traffic density;[14] operating conditions;[15] mileage haul;[16] the base-group differential method of dividing rates;[17] the history of the divisions involved;[18] and traffic studies.[19]

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[8]319 I.C.C. 639, 649-653 (pp. 19a-24a).
[9]Id., pp. 647-649, 659 (pp. 17a-19a, 32a).
[10]Id., pp. 657-658 (pp. 29a-30a).
[11]Id., pp. 644-646, 653-656, 658 (pp. 13a-15a, 24a-28a, 30a).
[12]Id., pp. 653-656 (pp. 24a-28a).
[13]Id., p. 658 (p. 30a).
[14]Id., p. 649 (p. 19a).
[15]Id., pp. 646-647 (p. 16a).
[16]Id., p. 643 (p. [illegible]).
[17]Id., p. 659 (p. 32a).
[18]Id., pp. 640-641 (pp. 8a-10a).
[19]Id., pp. 642-644 (pp. 10a-13a).

Appellants advanced this contention as one of its principal points before the district court. That court expressly found:

> "The Commission did not ignore the criteria set out in the foregoing statute, but, instead, carefully considered all of the requisite factors. . . ." (p. 3a)

Appellants do not numerically list this objection as one of the questions presented to this Court (pp. 4, 5), advancing it merely as an introductory and passing remark preceding and following their listing of questions presented.

With regard to the numerically listed questions,[20] even a first reading of them discloses their unsubstantiality. They relate entirely to the methods employed by the Commission in arriving at the relative costs of Southern and L. & N.

In undertaking to bring such matters within the orbit of judicial review, Southern has resorted to the course routinely followed in attacks on Commission orders, that is, to charge that the Commission exceeded its statutory authority, that it failed to make adequate findings supported by substantial evidence, and that it acted arbitrarily. The district court expressly ruled against these same contentions, and Southern has failed altogether to show that judgment to be unsound.

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[20] In the final paragraph on page 22 of the Jurisdictional Statement, Southern asserts that there are "other substantial questions that we will argue if jurisdiction is noted." This makeweight statement adds nothing to the presentation of questions in the Jurisdictional Statement. Every point advanced by appellants was shown to the district court to be unsubstantial, and was clearly so recognized in the unanimous *per curiam* opinion of the district court.

1. THERE WAS NO STATUTORY MISCONSTRUCTION.

In asserting that there are substantial questions of law presented, appellants reveal, under the heading "The Questions Presented Are Substantial" (p. 10), that the chief one upon which they rely is what they call "the proper construction of an important section of the Act" (p. 11). The subject is thereafter dealt with at page 17 of the Jurisdictional Statement, where appellants attribute something to Section 15(6) of the Interstate Commerce Act that is not in it. They assert that in "forsaking" a certain kind of comparison which they indicate is an established standard (without showing that it is either established or a standard) "in favor of some other goal," the Commission took action that Section 15(6) "does not permit." Appellants then quote from that section, but there is no forbidding language in the matter quoted nor anywhere else in Section 15(6). To the contrary, Section 15(6) requires the Commission to give due consideration, among other things, to certain specified factors in determining a case involving the division of joint rates and in prescribing new divisions.

Appellants seemingly do not understand the language they quote from Section 15(6), and manifest no familiarity with this Court's interpretation of it. The specific factor they quote, in part, is: [the Commission shall give due consideration, among other things, to] "the amount of revenue required to pay their [the involved railroads'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation. . . ."

The clause relates to the financial condition of the involved carriers and their ability to perform the function of common carriers. It is commonly spoken of as the provision which requires the Commission to consider the relative revenue needs of such carriers, and those needs are usually measured by comparative rates of return on property investment, ascertained by relating to such investment net railway operating income. *New England Divisions Case*, 62 I.C.C. 513, 520 (1921); 66 I.C.C. 196, 202 (1922); 261 U. S. 184 (1923); *Divisions of Freight Rates*, 148 I.C.C. 457, 476, 477 (1928); *B. & O.* v. *United States*, 298 U. S. 349, 359, 360 (1936); *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175, 185, 186 (1939); *Official—Southern Divisions*, 287 I.C.C. 497, 503-505 (1953). Please see also: *Criteria in the Establishment of Freight Rate Divisions*, by Jervis Langdon, Jr., 39 Cornell Law Review 213, 218 (1954).

The meaning of the clause referred to, being that which we have briefly stated, was clearly explained by this Court in *B. & O.* v. *United States, supra.* It is perfectly plain that it has no such meaning as appellants ascribe to it.

This is an excellent illustration of the correctness of the district court's observation that ". . . counsel for Southern has attempted to find questions of law where there are none" (p. 4a).

Everything appellants say about the Commission having "exceeded its statutory authority by attempting

to equalize carrier costs" (pp. 4, 5, 16 *et seq.*) proceeds from this misunderstanding of the law.

Appellants direct their criticisms of the Commission to three aspects of its costing procedures in the development of car costs (pp. 14, 15), the first being with respect to the employment of a car-day basis or, as appellants say, a "time" basis. This was necessary in order to place L. & N.'s car costs on a basis comparable to those of Southern. The necessity arose from the unusual situation existing in this case in which L. & N. supplies all the cars for the movement, Southern simply paying car rental on the established per diem basis (Tr. 1939). Such procedure was wholly proper and resulted in no inflation in L. & N.'s costs.

Boston and Maine R. Co. v. *United States,* 162 F. Supp. 289 (D. Mass. 1958), dismissed on appeal without prejudice, 358 U. S. 68 (1958), cited by appellants, does not support their position. That case was in no way concerned with divisions of freight rates but rather with per diem or car rental charges. But passing that factual difference, we point out that the Court did not hold that it was improper for the Commission to establish car rental rates on a time basis, but that the Commission should not reject, without adequate consideration, any suggested basis of car rental rates reflecting mileage as well as time. The Commission did not here reject, without adequate consideration, the idea of car costs based on mileage as well as time. This matter was considered at great length in the recommended report of the hearing examiner, at pages 44, 46-48 and 51-53. The examiner found that "mileage

separation of the L. & N.'s expenses causes severe penalties to that road when compared with the Southern's car costs computed on a per diem basis" (Examiner's Recommended Report, p. 52). He arrived at the ultimate finding, on page 53, that "the most equitable cost proportions" are those based upon "the L. & N.'s car costs on a car-day basis at the reproduction level and with the Southern's car costs on the per diem basis." These findings were adopted in the Commission's report "in all material respects."[21]

The second criticism is that original costs rather than reproduction costs should have been used in determining L. & N.'s car costs. Depreciation based on original costs for L. & N. would have been unrealistic in this case, because the car costs of Southern were based upon reproduction. Furthermore, car costs which provide only for depreciation on the original costs of the cars, would not reflect their true economic value. The deflation in the value of the dollar would clearly render the use of original costs for L. & N. cars improper. Depreciation based on original costs would not be sufficient for the L. & N. to replace even one-half of the cars used in the movement (Ex. C-43-A; Tr. 354). That this cannot be just or right is apparent.

The third criticism, that the Commission should have reduced L. & N. costs by a substantial portion of the per diem payments made by Southern, is patently unsound. Here again appellants confuse divisions of revenues from joint rates with per diem or car rental.

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[21] 319 I.C.C. 639, 653 (p. 24a).

These are altogether different things. Per diem is purely rental paid for equipment furnished by L. & N. and used by Southern. This is exactly the same in character as rental paid by any railroad for use of the facilities of another. It may be illustrated by the fact that L. & N. would receive per diem on a car used by Southern, in a movement in which L. & N. had not participated. It is obvious that L. & N. would receive no division in such instances, yet the full rental for its cars must be paid by the using line. To treat any portion of the car rental received as a part of the divisions would be completely foreign to the function of fixing of divisions, economically unsound and productive of chaotic results.[22] The Commission recognized the unsoundness of the position in rejecting it, and this technical issue is one solely for the Commission to determine.

Finally, it is not correct to say, as appellants do, that the Commission attempted to equalize carrier costs. Appellants deal with only one element of costs, car costs, and the Commission did not begin to equalize even car costs. It allowed Southern $2.75 per day, and L. & N. $1.78 as their respective car costs.

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[22]To accept Southern's thesis as correct would mean that all divisions on all traffic throughout the United States should be changed day-by-day and car-by-car on each of the thousands of daily shipments, depending on ownership and value of the car used for each individual movement. This would be an impossibility.

2. TO ARGUE THAT THE COMMISSION'S COST DETERMINATION OPERATED TO OVERSTATE THE COSTS OF ONE PARTY IS NOT TO PRESENT TO THIS COURT A SUBSTANTIAL LEGAL QUESTION.

Notwithstanding the substantial difference, favoring Southern, between the car costs of the parties as determined by the Commission, Southern argues that the car costs determined for the L. & N. were too high, or were "overstated" (pp. 11-13).

This is not true; but the vital question here is simply: Does this present a substantial legal question for determination by this Court? Manifestly it does not. For it is nowhere made a function of this Court to substitute its judgment for that of the Commission in cost ascertainment. The Commission is the body established to make proper cost determinations. This Court has made that perfectly plain when it said, in *New York* v. *United States,* 331 U. S. 284 (1947), at page 328:

> ". . . The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal."

In like vein, this Court also said at page 335 of the opinion in that case:

> ". . . These problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic

is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated."

And in footnote 33 to the last quoted statement, the Court quoted the following from *Hamilton, Cost as a Standard for Price,* 4 Law & Contemp. Prob., 321, 329:

"' 'Now and then a hardy soul, equipped with simple faith and a calculating machine, essays the adventure of rates based upon the true costs of particular services. The feat is, of course, technically impossible, for value judgments or empirical rules are essential to the distribution of overhead. A calculation of the real cost of transporting cotton-seed in less than carload lots from Lampassas, Texas to Kankakee, Illinois, is a stubborn exercise in imputation.' "

Again, in dealing with the matter of judicial review of costs employed by the Commission, this Court said in *Illinois Commerce Commission* v. *United States,* 292 U. S. 474 (1934), at page 481:

"Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's

> determination, it is not subject to review in the courts. See *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *Assigned Car Cases*, 274 U. S. 564, 580."

And further, at page 484:

> ". . . Appellants reach their conclusion as to the reasonableness of the interstate rate by disregarding the cost study as evidence because, as is contended, it was erroneously considered by the Commission. But as we have already said it was for the Commission to determine whether the cost study was adequate or whether it was necessary to refine or supplement it in order to make it dependable evidence for the purpose of rate making. The study itself afforded evidence of the reasonableness of the rate fixed, and upon the whole record there was abundant support for the Commission's finding, which was carefully and thoroughly considered in its report. There is no basis upon which the courts, not authorized to weigh evidence, could reexamine or disregard its conclusion."

So it is clear to the point of being conclusive that appellants do not, in arguing to this Court that L. & N. costs were overstated by the Commission, present a substantial legal question for this Court's determination.

3. NO REAL QUESTION OF ADEQUACY OF FINDINGS, OF SUPPORT BY SUBSTANTIAL EVIDENCE, OR OF ARBITRARY ACTION IS PRESENTED.

Appellants undertake here and there (pp. 5, 18) to dress their contentions up in the language of legal questions when they say they present questions whether "the Commission made adequate findings supported by substantial evidence," and whether "the Commission acted arbitrarily," but there is no real question of this kind presented.

The three-judge district court expressly found:

> "Having determined comparative costs to be a factor of especial importance, the Commission then carefully considered all of the evidence relating to costs, determined the fully distributed costs of each carrier, and adjusted the division of rates accordingly. The ultimate facts found are supported by substantial evidence." (p. 3a).

Appellants do not show otherwise. They do assert that the Commission "accepted the L. & N.'s cost figures in gross" (p. 14), but this is untrue. Actually, L. & N. offered three separate bases for computing its car costs. Furthermore, the impression sought to be left that the Commission considered only the costs developed by L. & N. is equally false.

Southern itself developed the first cost study offered in evidence, presenting it as reflecting only its expenses. That study was not computed in accordance with the formula which Southern now insists is the only proper basis for ascertaining such costs.

Based thereon Southern asked for what it called a "conservative" increase of 53 percent in its divisions (Tr. 738). Since Southern was already receiving 64.32 percent of the revenue (p. 28a), a 53 percent increase would have given it 98.3 percent of the total revenue and would have left the L. & N. with only 1.7 percent.

A detailed analysis of that so-called cost study was made on behalf of L. & N. by the man who created the Commission's formula to which Southern refers, and reworked by him to remove the effects of major errors and fundamental misconceptions in costing procedures, exaggerated by duplication of certain expense items, which revealed an overstatement in Southern's costs of more than $81 per car, or 71 percent (Tr. 1122-1126). The L. & N. thereafter made a study of L. & N.'s costs on a basis comparable to the corrected costs of Southern.

Southern then made a second cost study containing many of the same monstrous flaws of its initial study. Southern's second study required extensive correction by the L. & N., and led to the L. & N.'s second study.

The hearing examiner discussed the cost studies at great length (I.C.C. Examiner's Recommended Report, pp. 32-44), and found that Southern's second study had such deficiencies as precluded its use as "a basis for fixing the divisions in the involved Knoxville coal traffic". (I.C.C. Examiner's Recommended Report, p. 51). The Commission, which adopted "the examiner's findings concerning costs in all material respects" (p. 24a), also found that a restatement of costs made by Southern in its exceptions to the exam-

iner's recommended report had "in it the same basic deficiencies as found in defendants' earlier cost studies" (p. 27a). This led to acceptance by the Commission of L. & N.'s restatement of Southern's cost showings as depicting the relative costs of the carriers in handling this traffic (p. 30a), such costs being found to be "reasonable and sufficiently reliable for the purposes of this case" (p. 24a).

Similarly, Southern's contentions before this Court about what are proper cost procedures and what are not will not stand the test of scrutiny; but we refrain from showing this in detail because, as we have shown, they present no substantial legal question for this Court—indeed no legal question at all, substantial or otherwise.

This Court will, therefore, fully appreciate why the district court concluded: "[C]ounsel for Southern has attempted to find questions of law where there are none" (p. 4a).

CONCLUSION.

Since the appellants present no substantial question for the decision of this Court, the final judgment of the district court should be affirmed.

Respectfully submitted,

R. WRAY HENRIOTT,
L. & N. Building,
Louisville, Kentucky 40201,
(Counsel of record on whom service should be made)

W. L. GRUBBS,
JAMES W. HOELAND,
ELBERT R. LEIGH,
JOSEPH L. LENIHAN,
L. & N. Building,
Louisville, Kentucky 40201,
Attorneys for Appellee, Louisville and Nashville Railroad Company.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 838

CAROLINA & NORTHWESTERN RAILWAY COMPANY, ATLANTIC & EAST CAROLINA RAILWAY COMPANY, STATE UNIVERSITY RAILROAD COMPANY, AND SOUTHERN RAILWAY COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action to set aside an order of the Interstate Commerce Commission issued pursuant to Sections 1(4) and 15(6) of the

Interstate Commerce Act (49 U.S.C. 1(4), 15(6)). The challenged order prescribed a new basis for the division of joint rail rates on coal shipments originating on the lines of the Louisville and Nashville Railroad Company ("L. & N.") and terminating on the lines of the Southern Railroad Company ("Southern") or its subsidiaries at points in North and South Carolina and at Augusta, Georgia (J.S. 7a–8a).

All the coal traffic involved is transferred between the L. & N. and the Southern at Knoxville, Tennessee. The traffic was developed by the L. & N. through construction of branch lines to coal mines in eastern Kentucky and Tennessee. It uses these lines almost exclusively for the transportation of coal and delivers 80 percent of the coal originating there to connecting carriers (J.S. 10a). As the originating carrier, it furnishes all the freight cars used, with the Southern paying a flat per diem rental of $2.75 per car (J.S. 19a). Virtually all of these cars are returned empty by the Southern (J.S. 14a–15a).

The Knoxville gateway was opened in 1918 and, in accordance with then existing traffic patterns, a division of the joint rates was established by private agreement between the L. & N. and the Southern. The agreement divided the through rate by giving the L. & N. a flat amount per ton from a group of mines, plus or minus differentials for other groups of mines depending on their distance from the base group (J.S. 8a–9a). The balance of the shipper's payment went to the Southern.

L. & N. initiated negotiations to obtain an increased share of the rates on the ground that circumstances

had changed since the division was first made. When the negotiations failed, L. & N. filed a complaint with the Commission against the Southern alleging that the existing divisions were unjust and unreasonable, in violation of Sections 1(4) and 15(6) of the Interstate Commerce Act.

Following full administrative proceedings, the Commission found that changes in the movement of the coal traffic since 1918 now require the L. & N. to originate almost 99 percent of that traffic at more distant mining areas than in the past and result in the Southern making deliveries at less distant destinations (J.S. 12a).[1] The Commission found, as a result, that for a four-month period in 1958 the L. & N.'s total car costs were $178,043, while those of the Southern (based upon the $2.75 per diem) were $158,041 (J.S. 37a–39a). On the basis of these and other undisputed cost data, the Commission concluded that under the old divisional agreement the L. & N. received only 35.78 percent of the total revenues involved while absorbing some 47.64 percent of the costs of the movement (J.S. 24a, 28a). On the other hand, the Southern received 64.22 percent of the revenues while bearing only 52.36 percent of the costs (J.S. 24a, 28a). Finding that the old rate divisions did not afford the L. & N. sufficient revenues to recover its out-of-pocket costs (showing a

[1] For example, while there was practically no movement from the farthest mines in 1917, in 1957 more than 44 percent originated there. In the destination areas, 27 percent of the tonnage in 1917 moved to North Carolina and 73 percent to more distant points in South Carolina. In 1957, the situation was practically reversed, with 70 percent of the tonnage terminating in North Carolina and 30 percent in South Carolina.

deficit of $135,207 in 1958), while the Southern's share amounted to an excess over its costs of more than one million dollars, the Commission determined that new divisions should be prescribed pursuant to Section 15(6) (J.S. 32a).

Applying the standards of Section 15(6), the Commission found that "both the L. & N. and the Southern are generally being operated efficiently and that, as to the particular traffic and issues involved, neither should be considered as more or less efficient than the other," and that there are no "substantial differences between the parties as to the importance to the public of their respective transportation services" (J.S. 30a). The Commission concluded that all other relevant factors under Section 15(6) being equal, "[a]ny change in existing divisions must be based primarily on cost of service considerations" (J.S. 30a).

Since the Southern paid the L. & N. a flat rental of $2.75 per car per diem, its freight car costs were readily ascertainable and the only dispute over costs, insofar as is relevant here, arose with respect to computation of the L. & N.'s freight car costs in connection with the coal traffic at issue. Both parties submitted lengthy studies of those costs and presented expert witnesses in support of their respective claims. Since appellants' cost studies contained "basic deficiencies" (J.S. 27a), they were rejected. The Commission adopted, as the most accurate calculations available, those of the L. & N. Its car costs were stated in terms of reproduction value rather than original costs, and allocated maintenance, repair, and depreciation expenses solely on the basis of the time

the freight cars spent carrying the coal on the L. & N. and did not consider the mileage the cars traveled in this transportation.

Using the L. & N.'s cost figures, the Commission prescribed new divisions on the basis of "the relative fully distributed costs of the carriers" (J.S. 33a–34a; see J.S. 37a–40a). The new divisions should increase the L. & N.'s annual revenues by about $540,000 (J.S. 34a) and permit both carriers to recover approximately 95 percent of their fully distributed costs. By contrast, under the old divisions, the L. & N.'s revenues failed to meet those costs by about $688,000 while the Southern's share exceeded its costs by approximately $402,000 (J.S. 34a).

On review, the three-judge district court unanimously sustained the order of the Commission, holding that "appraisal of cost figures is itself a task for experts * * *. [W]e do not perceive it was inexpertly done, nor have we the power to substitute our fact appraisal for that of the Commission" (J.S. 3a–4a).

ARGUMENT

The Commission's order in this case, unanimously affirmed by the district court, complies with the direction of the Interstate Commerce Act that divisions of joint railroad rates be established on a just, reasonable, and equitable basis with no undue preference or prejudice as between participating carriers (Sections 1(4) and 15(6)). Appellants do not deny that marked changes in circumstances since 1918 have rendered the old method of division unjust to the L. & N.; and that new divisions should be prescribed

pursuant to Section 15(6) of the Act. Nor is any challenge made to the propriety of the Commission's conclusion that such a prescription in this case "must be based primarily on cost of service considerations." The objections which appellants do raise relate solely to the adequacy of the computation of only one of the many cost items, *i.e.*, comparative freight car costs (see J.S. 37a–39a) which were considered by the Commission in ordering the new divisions of rates. These factual questions have no substantial importance in the administration of the Interstate Commerce Act and do not warrant plenary consideration by this Court.[2]

1. Appellants contend primarily (J.S. 4–5, 15, 16–17, 19–20) that the Commission miscalculated the freight car costs of the L. & N. by utilizing a depreciation and return factor based upon current reproduction value rather than the original costs of the cars as reflected on the L. & N.'s books. As appellants apparently recognize (J.S. 21), in the usual rate division case each carrier normally supplies a share of the freight cars used in the through movement and it matters little in dividing revenues on the basis of cost of service whether depreciation is stated for all parties concerned in terms of replacement or original costs since these items will tend to cancel out each other. The present case is unusual, however, in that the L. & N. owns and supplies *all* of the freight cars used

[2] As the district court noted (J.S. 4a), "Southern has attempted to find questions of law where there are none. The Commission has acted neither capriciously nor arbitrarily nor has it misinterpreted or misapplied the law."

in the traffic involved while the Southern pays the L. & N. a flat rental of $2.75 per diem per car.[3] It would be unrealistic, in ascertaining the L. & N.'s actual current freight car costs, to use a depreciation figure based on original acquisition costs, even if such costs may be appropriate, as appellants note (J.S. 15, 21), for routine bookkeeping and tax purposes or even for the "traditional" rate division case. Thus, as both the hearing examiner (Recommended Report, pp. 14–15, 52–53) and the Commission (J.S. 14a) pointed out, the cost of replacement of the L. & N.'s coal cars at current prices would exceed the present book value of its entire fleet of some 60,000 freight cars.[4] The Commission therefore did not err in rejecting as inequitable, in determining present costs, the original expense to the L. & N. of its equipment, a figure giving "no consideration * * * [to] the owning road for the replacement of obsolete cars at current inflated prices" (Recommended Report, p. 52) [5] and not reflecting "actual freight car expenses

[3] These per diem payments are the same for all railroads and are based upon reproduction value, not original cost. See, *e.g.*, *Chicago, B. & Q. R. Co.* v. *New York, S. & W. R. Co.*, 297 I.C.C. 291, 301.

[4] The Commission found that coal cars have a depreciable life of 30 years (J.S. 14a). The record shows that the current average per car cost for coal cars has increased more than 500 percent since 1920 (Exs. C–43a, C–28; Tr. 120, 354, 1357).

[5] The hearing examiner's lengthy findings as to relative costs (Recommended Report, pp. 32–54) were adopted by the Commission "in all material respects" (J.S. 24a). The Commission also made additional findings as to costs (J.S. 24a–28a, 37a–39a). There is no merit in appellants' argument (*e.g.*, J.S. 5) that no adequate findings were made sustaining the Commission's ultimate conclusions in this case.

and return on investment * * *" (*id.* at 53).

Contrary to appellants' assertions (J.S. 16–22), the objective of the Commission in utilizing reproduction value,[6] instead of original cost, was not to "equalize" the costs of the two carriers but to ascertain relative costs. Had equalization been its goal, it seems clear the Commission would not have rejected, as failing to reflect *actual* costs, the L. & N.'s first proposal that its car costs be computed on the assumption that it, like the Southern, had rented the coal cars for $2.75 per day rather than purchased them (see Recommended Report, pp. 52–53; J.S. 24a). The Commission's utilization, instead, of the much lower cost figure of $1.78 refutes appellants' contention (J.S. 12) that the Commission "grossly inflated" the L. & N.'s car costs to achieve equalization.[7]

2. Appellants also contend (J.S. 5, 13, 14, 17, 18–19) that the Commission's computations of the L. & N.'s

[6] The replacement factor employed by the Commission did not, in fact, allow the L. & N. 100 percent of current reproduction value but only approximately 67.6 percent of that value as of 1957 (see Ex. 257, Table 14). Allowance of full reproduction value would have substantially increased the L. & N.'s car cost figure of $1.78 per day as found by the Commission (see Ex. C–43a; Tr. 120, 354, 1357).

[7] Appellants contend that the Commission's reference to "comparable * * * costs" and the desirability of placing the parties on an "equal footing" (J.S. 25a) establishes their claim of equalization. As indicated above, however, it is perfectly clear that the Commission was referring to the necessity of ascertaining the *actual* relative costs of the two carriers as accurately as possible, without "special handicap or advantage favoring one carrier over the other" (J.S. 31a).

car costs were further distorted when it allocated repair, maintenance, and depreciation expenses solely on the basis of time, with no portion of these expenses being ascribed to actual use or mileage. However, appellants submitted no cost studies of the L. & N. based on time-use and reproduction cost. Since the Commission properly rejected, as we have seen, figures based on original cost, it correctly declined to use appellant's studies which, without separation, employed time-use and original cost (see J.S. 27a). Moreover, it appears that allocation of freight car costs on a time-mileage basis would not have substantially altered the computation of L. & N.'s costs. One of L. & N.'s studies which followed time-mileage would have reduced its total costs of more than $600,000 by only $20,398 (see Recommended Report, p. 48). The Commission, in these circumstances, properly followed the administratively more appropriate method of allocating all the repair, maintenance, and depreciation expenses entirely on the basis of the time which the freight cars spent in carrying the coal on L. & N.'s lines.

3. Finally, there is no merit to appellants' argument (J.S. 4–5, 14, 15, 17, 20–22) that the L. & N.'s car costs should have been reduced by deducting from them the difference between Southern's per diem payment of $2.75 per car while L. & N.'s cars were on Southern's tracks and the L. & N.'s per day car cost of $1.78 (or $0.97 per car per day) (J.S. 21–22). This argument confuses two wholly unrelated subjects, namely, *freight* revenues and *rental* revenues. Section 15(6) of the Act, as it applies here, deals with rate

divisions on the basis of the carriers' respective costs and revenues in providing *"the service of transportation"* (emphasis added). 49 U.S.C. 15(6). The L. & N. participates in a "transportation service" only between the coal mines and Knoxville. Beyond the interchange point on the Southern's lines, L. & N. is merely renting its facilities to another railroad. Whether the L. & N. made or lost money on the rental transaction does not affect L. & N.'s costs in providing "the service of transportation" on its own lines.

Moreover, appellants' argument is based on the assumption that the record shows that the Southern's per diem payments yield a net profit to the L. & N. But the only profits from per diem payments shown in this case relate to the L. & N.'s "entire fleet of all types of freight cars and results from its rental payments to, and rental income from, all its connecting railroads" J.S. 49a–50a). Appellants attempted no showing, and the record does not otherwise reflect, that *any* net credit accrues to the L. & N. from its car rentals to the Southern in connection with the coal traffic here in question.

CONCLUSION

The Commission's appraisal of the cost figures in this case represents a careful and reasonable effort to solve a complicated problem in transportation economics—one which, "unlike a problem in calculus, cannot be proved right or wrong." *New York* v. *United States,* 331 U.S. 284, 328. Its rulings on each of the above issues were within the realm of admin-

istrative expertise. The case presents no substantial question which would warrant a second review. We respectfully submit that the judgment below should be affirmed.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
LIONEL KESTENBAUM,
DONALD L. HARDISON,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
ARTHUR J. CERRA,
Assistant General Counsel,
Interstate Commerce Commission.

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Supreme Court of the United States

OCTOBER TERM, 1964

CAROLINA & NORTHWESTERN RAILWAY COMPANY, ATLANTIC & EAST CAROLINA RAILWAY COMPANY, STATE UNIVERSITY RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY, *Appellants*,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

W. GRAHAM CLAYTOR, JR.
HENRY J. KARISON
Southern Railway System
P. O. Box 1808
Washington, D. C. 20013

HUGH B. COX
WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Appellants

Of Counsel:

COVINGTON & BURLING

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The appellees' motions are compounded of irrelevancies, disagreements between themselves and reiteration of the theme that the judgment below should be affirmed because the questions presented on this appeal cover matters within the supposed expert discretion of the Interstate Commerce Commission as to which its judgment is conclusive. That is not an accurate view of this case or of the applicable law. The Commission, like any other agency, is bound by the terms of the statute it administers. And, like any other agency that decides cases on a record, it is subject to the requirement of Section 8(b) of the Administrative Procedure Act that its decision include a statement of "findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record." Those limita-

tions on the Commission's power are judicially enforceable in the interest of guarding against unlawful and arbitrary administrative action. The Commission here did not comply with the governing statute or make appropriate findings on the issues of fact and law encompassed by the questions presented in this case or state comprehensible and rational grounds for its resolution of them.

The importance of this case is not confined to the particular divisions involved. Southern participates in joint movements of coal with other railroads in the geographical area involved in this case; there are other joint movements of coal in that area in which the Southern is not a participant. The Commission's decision disrupts the basis on which all of these coal divisions have been established for many years. The decision will doubtless be regarded by other carriers as establishing a pattern for the re-division of revenues from the carriage of coal throughout the southeastern part of the United States. For that reason the questions presented are likely to arise again both before the Commission and in the courts. The Commission's decision should not be allowed to serve as a precedent if it does not comport with the statute and if it is not supported by adequate findings and reasoning.

I. WHAT IS AT ISSUE

The L. & N. devotes nearly two pages of its motion to answering an argument that appellants do not make in this Court (L. & N. Motion pp. 5-7)—that the Commission erred in its conclusion that as to all other relevant factors things were equal as between the contending carriers and in its consequent decision to rely solely on the relative costs of the carriers. The Commission's exclusive reliance on costs, which is not contested here, make extraneous all of the discussion

in the motions concerning the purported lengthening of the L. & N.'s haul over the years, the purported burden upon it of originating the coal movement and other matters on which the appellees dwell (L. & N. Motion pp. 2-4; Gov't Motion pp. 2-4). The Commission's decision to rest its determination on costs alone made it essential that the Commission measure the actual relative costs of the carriers—not fictitious costs—and that in doing so it should not, without rational explanation or grounds, adopt methods that have no sanction in logic, authority, experience or the Commission's own accounting standards. The Commission's report and the cost findings of its hearing examiner show that it disregarded these limitations on its authority. That is the substance of appellants' complaint.

The appellants do not, as the Government contends, concede "that marked changes in circumstances since 1918 have rendered the old method of division unjust to the L. & N., and that new divisions should be prescribed pursuant to Section 15(6) of the Act" (Gov't Motion pp. 5-6). Both the Commission's determination that existing divisions were unlawful and its prescription of new divisions for the future, both made pursuant to Section 15(6), were based upon costs. If the Commission erred in its computation of costs, then the finding of unlawfulness as well as the prescription of new divisions for the future is affected by the error.[1]

[1] Appellants have stated without contradiction that correction of the three errors of the Commission discussed in the Jurisdictional Statement would reduce from $540,000 to $226,149 the annual shift of revenues from the Southern to the L. & N. (Jur. St. p. 15). Correction of other errors that appellants would deal with on plenary consideration of the case (*id.* p. 22), would result in a showing that the L. & N. receives no less from existing divisions than its costs entitle it to.

II. THE STATUTORY ISSUE

Appellants contend that the Commission decision, in its adoption of a mistaken theory of comparability of costs, reflects a misunderstanding of the congressional direction in Section 15(6) that the Commission consider "the amount of revenue required to pay . . . [the carriers'] respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation . . . ." (Jur. St. pp. 16-18). The L. & N. says that in making this contention appellants themselves misread the governing statute. (L. & N. Motion pp. 8-10).

To be sure, the quoted clause of the statute covers the matter of relative systemwide revenue needs of the carriers dividing joint rates, as the L. & N. says; the Commission found in this case that neither carrier stood in greater need of revenues than the other (Jur. St. p. 30a). But the clause covers more. It covers in addition the matter of the relative costs of the carriers for the particular service in issue. That was made clear by this Court in *Baltimore & O.R.R.* v. *United States,* 298 U.S. 349, 360 (1936). See also *Divisions of Freight Rates,* 165 I.C.C. 94, 100-01 (1929) (Commissioner Eastman). Moreover, it has never been suggested that in either aspect the statutory provision authorizes the Commission to determine anything other than actual "operating expenses" of the carriers.

The Government does not make the same statutory argument as the L. & N. It does not, as the L. & N. appears implicitly to do, claim for the Commission the power under the statute to substitute fictitious or hypothetical costs for the actual relative costs of the carriers, as best they can be determined. It does, however, join with the L. & N. in seeking to sustain a decision in

which the Commission did just that, as we have shown in our Jurisdictional Statement and as we shall again demonstrate below.

III. THE COMMISSION'S FINDINGS AND REASONING

A. Reproduction Value

The Commission was explicit that it used reproduction value in computing the car costs of the L. & N. because "the per diem charges paid by the Southern were determined upon a reproduction cost basis," and the use of reproduction value for the L. & N. "makes comparable these costs as between the complainant and the defendant placing them on an equal footing." (Jur. St. p. 25a).

The demonstrated infirmity, in both law and logic, of this concept of comparability (Jur. St. pp. 19-20) prompts the appellees all but to ignore the only reason stated by the Commission for its use of reproduction value in computing the L. & N.'s car costs. They make no more effort than did the Commission to explain why its conclusion follows from its premise. The appellees turn instead to a rationale for the use of reproduction value here that would justify its use, not just in this divisions case, but in every rate case before the Commission. (L. & N. Motion p. 11; Gov't Motion pp. 6-8). They say, in substance, that because the cost of cars has risen the use of original cost for computing depreciation would not adequately compensate the L. & N. This is a rationale that the Commission did not offer, and it thus runs afoul of the elementary rule that an agency order is judged by the reasons assigned by the agency and not reasoning supplied by the agency's lawyers on appeal or by a private litigant. *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-69

(1962); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943). Moreover, the Commission itself would presumably disown the reasoning because for many years it has used original cost in determining the justness and reasonableness of rates.[2] Thus the pleas of the L. & N. that the use of original cost would not reflect the "true economic value" of its cars and of the Government lawyers that "the cost of replacement of the L. & N.'s coal cars at current prices would exceed the present book value of its entire fleet of some 60,000 freight cars" should be addressed to the Commission in its rate-making capacity, not used in support of a decision in which, whatever else may be said of it, the Commission plainly did not conceive of itself as deserting the original cost precepts that it has applied for many years with the sanction of this Court.

B. Time and Mileage Separation

The appellees again disagree with each other when they seek separately to justify the Commission's action in attributing all of the L. & N.'s car repair and depreciation costs to the passage of time and none to the use made of the cars.

The L. & N. thinks that the hearing examiner's statement that to relate car costs to both time and use would cause "severe penalties" to the L. & N. is an adequate "finding" to justify a method of computing costs that disregards the way in which they are actually incurred. (L. & N. Motion pp. 10-11). The Government, on the other hand, apparently thinks that

[2] The statement of the Commission about the replacement cost of the L. & N.'s hopper cars, to which the Government refers in its discussion of this point (Gov't Motion p. 7), was not made in connection with the Commission's treatment of costs but in quite a different context. (Jur. St. p. 14a; see Jur. St. p. 24a).

the failure to make the time-mileage separation was permissible because to make it would have caused scarcely any penalty at all to the L. & N. (Gov't Motion pp. 8-9). At any rate that is what the Government seems to say after first making the curious argument that the Commission could properly disregard the separation because the appellants' cost studies were based both on time and mileage and original cost, and the Commission correctly declined to adopt those studies because of their failure to use reproduction value. There is no relationship between the time and mileage computation and the question of original cost. The argument seems to assume that if an agency is entitled to reject one aspect of a litigant's evidence it is entitled to reject a different and unrelated aspect without any consideration of its merits. This is an extraordinary view of the duty of an administrative agency. It was the obligation of the Commission to appraise each factual issue on its own merits and if necessary to probe for facts that would provide a rational basis for resolution of the issue.

The Government acknowledges, moreover, that no real probing was necessary—that the figures on which to base a time and mileage separation were available to the Commission on the record in the evidence of the L. & N. Its ultimate conclusion is that the Commission was justified in disregarding those figures because they would not have made much difference anyway and so it was "administratively more appropriate"—which must mean "easier"—to attribute all car costs to the passage of time, even though depreciation and repairs are in major part a function of use. That, once more, is not the reason assigned by the Commission for its action; its only reason was that given by the hearing

examiner, which the Government does not even bother to note and in substance disavows.[3] Moreover, the reason now given by the Government on appeal is plainly inadequate. The $20,398 reduction in the L. & N.'s costs, which is what the Government says would result from making the time-mileage separation, means, in this case where a divisional scale was made to relate directly to costs computed for a four-month test period, a shift of $61,000 in annual revenues from the L. & N. to the Southern. This loss to the Southern will recur each year throughout the indefinite period in the future in which the prescribed scale of divisions will be applied. The amount involved cannot be dismissed as insignificant.

C. The Per Diem Credit

Neither appellee is willing to subscribe to the hearing examiner's stated reasons, adopted by the Commission, for failing to give full instead of partial effect to the Southern's per diem payments as an offset to the L. & N.'s car costs. This is altogether understandable because the examiner's treatment of the matter is very murky indeed. It is true, as the Government points out (Gov't Motion p. 10), that he confused two separate matters: (1) the overall position of the L. & N. as a net lessor of freight cars and its consequent systemwide excess of per diem income

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[3] The Government at one point in its motion refers to "lengthy findings" as to relative costs made by the hearing examiner and adopted by the Commission, as if a citation to the number of pages on which the examiner dealt with costs is by itself a refutation of our contention that findings on the points here at issue were inadequate. (Gov't Motion p. 7 n.5). We submit that there is nothing in the pages cited by the Government going to those points beyond what we have quoted or paraphrased in our Jurisdictional Statement.

over per diem outgo, and (2) the excess in this movement of the per diem payments it receives over the car costs it incurs during the period for which it receives per diem payments. Nevertheless, the examiner did find "that there is a spread between actual car costs of the L. & N. and rentals received from the Southern on the Knoxville coal traffic . . . ." (Jur. St. p. 50a). And regardless of that, it cannot be denied that there is such a spread. The L. & N. does not deny it.[4] The Government at two points seemingly affirms the existence of the spread when it states or accepts the statement that the L. & N.'s car costs were $1.78 per car day (Gov't Motion pp. 8, 9), while the per diem rate was $2.75. Yet, in the concluding paragraph of its argument the Government baldly states that there was no showing in the record "that *any* net credit accrues to the L. & N. from its car rentals to the Southern in connection with the coal traffic here in question." (Gov't Motion p. 10). There are some problems in transportation economics that, "unlike a problem in calculus, cannot be proved right or wrong," *New York* v. *United States*, 331 U.S. 284, 328 (1947) (Gov't Motion p. 10), but this is not one of them. A dollar and seventy-eight cents is less than $2.75, and that means that the L. & N. had a net credit from car rentals in

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[4] The L. & N. does take exception to our pointing out that most of the cars used in the movement were old 50-ton hopper cars, which is one of the factors making the rentals it receives larger than the costs it incurs. (L. & N. Motion p. 4 n.4). Simple arithmetic shows that in the four months used as a test period for computing costs, most L. & N. cars were 50-ton cars. In that period 7,906 cars (Jur. St. p. 10a) moved 437,196 tons of coal (*id.* p. 38a). That is an average of 55.3 tons per car. A fully-loaded car of nominal 50-ton capacity carries about 55 tons of coal. The L. & N. has purchased no 50-ton hopper cars since 1951. (Exs. C-26, C-28).

this movement.[5] The Government is plainly wrong and the appellants and the hearing examiner are right.

For the rest of their discussion of this point, the appellees rely on what can be termed the "landlord" argument. (Whatever the merits of this argument, it bears emphasis that it is the appellees' argument on appeal; it is not reflected in the Commission's report or in its hearing examiner's decision.) In effect, the appellees say that the situation here is just as if the L. & N., independently of its railroad operations, were the owner of facilities that the Southern leased from it. In such a case the Southern's rental payments would be a part of its costs to the extent that the facilities were allocable to the movement in issue, but the L. & N.'s receipts would have nothing to do with its divisions. This is a wholly unrealistic view of the problem that the Commission faced in this proceeding. The Government's uniquely narrow reading of the statutory words "transportation service" as being limited to a carrier's operations on its own line (Gov't Motion pp. 9-10) does not make it any less so.

Moreover, it is not the view that the Commission takes when it focuses on the question rather than ignoring it, as it did in this case. In *Akron, C. & Y. R.R.* v. *Atchison, T. & S.F. Ry.*, 321 I.C.C. 17, 43 (1963),[6] the

[5] In the L. & N.'s exhibits three separate figures for its car costs per car day are set forth, and none of them approaches $2.75. The figures are $1.34, based on original cost (Ex. C-200, Sheet 2), and $1.43, based on original cost, and $1.78, based on reproduction value (Ex. C-257, work table 14, footnote 2, sheet 1 of 9).

[6] This is the transcontinental divisions case, in which the Commission's order was set aside, on grounds unrelated to the point under discussion. Atchison, T. & S.F. Ry v. United States, S.D. Cal. No. 63-745-EC, decided Jan. 25, 1965. Notice of appeal to this Court has been filed.

Commission found that the Group I costs (car costs) of a given railroad, as computed according to its costing formula, Rail Form A,

> "include principally car repairs, depreciation, and return on all cars owned. Per diem payments for foreign cars serving on this road are added, and per diem receipts from home cars serving on a foreign road are subtracted. The inclusion of per diem settlements adjusts the costs from the basis of cost of cars owned to the basis of cost of cars serving on the road. These latter costs are divided by the service car-miles to give a cost per car-mile. Thus, if per diem is more or less than car ownership costs, a substantial difference can result: a difference which represents actual dollars paid out or received."

The Commission made clear that it approved of this procedure. *Id.* at 44. If the procedure had been followed in this case, just what we have said should have been done would have been done: the L. & N.'s costs of car repairs, depreciation and return on all cars owned by it and used in the movement would have been computed and from these costs its per diem receipts from cars serving on the Southern would have been subtracted; there would have been no per diem payments to add because the L. & N. supplied all the cars, and for the same reason the Southern's per diem payments properly were computed as its only car costs. The error of the Commission lay in its unexplained failure to subtract from the L. & N.'s total car costs the entire amount of its per diem receipts. The failure resulted in nonrecognition in this case of what the Commission in the opinion from which we have quoted stated as a fact, that "if per diem is more . . . than car ownership costs, a substantial difference can result:

a difference which represents actual dollars . . . received.'"

The indefensibility of the appellees' position can be demonstrated by supposing that railroad interchanges operated a little differently from the way they do. If L. & N. crews were used to operate the coal trains in this movement over some or all of the Southern's tracks, and the Southern paid the L. & N. somewhat more for their services than the L. & N. paid to the crews in wages, we doubt that the appellees here would be arguing that the excess of the payment was not an effective offset to the L. & N.'s costs of rendering the service involved. To make the point a different way, if there were no per diem payments at all, there can be no doubt that the L. & N. would claim, and the Commission in prescribing divisions would allow, its full car costs, on-line and off-line, for a movement in which only its cars were used.

The situation here is no different in principle. The L. & N. is entitled to recoup its full car costs from the coal traffic revenues. An offset to those costs, however, is provided by the L. & N.'s rental payments. In this case the Commission has allowed that offset but only to the extent that the rental payments equalled the costs incurred by the L. & N. when the cars were off its line. It has not explained, and the appellees have not adequately explained—even were they entitled to do so independently of the Commission—why the full offset should not be given effect.

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[7] See also Motor Vehicles—Wayne & Wixon, Mich., to Milwaukee, Wis., 323 I.C.C. 266, 272 (1964).

CONCLUSION

The motions to dismiss should be denied and probable jurisdiction of the appeal noted.

Respectfully submitted,

W. GRAHAM CLAYTOR, JR.
HENRY J. KARISON
Southern Railway System
P. O. Box 1808
Washington, D. C. 20013

HUGH B. COX
WILLIAM H. ALLEN
701 Union Trust Building
Washington, D. C. 20005

Attorneys for Appellants

Of Counsel:

COVINGTON & BURLING

March 1965